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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

JURISDICTIONAL STATEMENT

LOUIS E. GOEBEL
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California 92101
Telephone: (714) 236-1414
Counsel for Appellant

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INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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IN THE

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No. _____

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

JURISDICTIONAL STATEMENT

San Diego Gas & Electric Company, Appellant, (hereinafter sometimes "the property owner") appeals from the final judgment of the California Supreme Court entered August 22, 1979, denying Appellant a hearing to review the opinion of the California Court of Appeal, Fourth Appellate District, Division One, which held that a property owner may never bring an action in inverse condemnation seeking compensation in money damages for an unlawful exercise of the police power by a governmental entity, even though that action is excessive, arbitrary, unconstitutional, and denies the property owner all

use of its land. Appellant submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

On October 8, 1976 a judgment was entered in San Diego County Superior Court awarding money damages to the property owner. (Appendix A) The Findings of Fact and Conclusions of Law entered by the Court established as a matter of fact after full trial of the issues that the actions of the City of San Diego against the subject property constituted a taking without due process of law and just compensation within the meaning of the California and United States Constitutions. (Appendix A) An appeal was taken by the City of San Diego to the California Court of Appeal, Fourth Appellate District, Division One.

On June 13, 1978 the California Court of Appeal filed its opinion, modified on denial of rehearing (Appendix C), affirming the judgment in all respects. The opinion was certified for publication by the Court and was reported at 81 Cal.App.3d 844, 146 Cal.Rptr. 103. (Appendix B) When the California Supreme Court granted a hearing on July 13, 1978 (Appendix D), the opinion of the Court of Appeal was "superseded" pursuant to California Rule of Court 976 and is no longer deemed to be published.

The case was never heard by the California Supreme Court. After maintaining the matter on its docket without scheduling oral argument, on June 14, 1979 the California Supreme Court

entered an order (Appendix E) retransferring the case to the Court of Appeal, Fourth Appellate District, Division One, for reconsideration in light of its recent decision in *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979). (Appendix F)

The California Court of Appeal, without additional briefing or oral argument, in an unpublished opinion dated June 26, 1979, directly and completely in contradiction to its previous opinion on the identical record, reversed the judgment of the trial court, finding that purported exercises of the police power, although arbitrary, unconstitutional, and denying the property owner all use of its land, do not require compensation. (Appendix G)

Appellant property owner's timely petition for rehearing to the Court of Appeal was denied by order filed July 9, 1979. (Appendix H) Appellant property owner's timely petition for hearing to the California Supreme Court was denied on August 22, 1979. (Appendix I)

JURISDICTION

A notice of appeal to this Court was duly filed in the California Court of Appeal, Fourth Appellate District, Division One (the Court having possession of the record of this case), on October 3, 1979 (Appendix J), appealing from the final judgment of the California Supreme Court. This appeal is being timely docketed in this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Appellant charges that the City of San Diego by its purported regulatory actions, in designating property owner's land as open space under its General Plan, in combination with

its zoning actions, its acquisition efforts, and its entire course of conduct, has destroyed the value of the land, prevented all use, and has thereby taken Appellant's property without due process of law and without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The judgment of the state court sustained the validity of these actions under the laws, ordinances, resolutions, and regulations of the City of San Diego and the State of California against the contention that they are repugnant to the Constitution of the United States.

Cases sustaining jurisdiction of an appeal to this Court from a judgment of a state court involving issues of whether a taking of private property has occurred and whether a property owner is entitled to compensation for the regulatory activities of a state or local government are the following: *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978); *Moore v. City of East Cleveland,* 431 U.S. 494 (1977); *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

QUESTIONS PRESENTED

1. Can a state court with impunity deny an aggrieved property owner its constitutionally mandated remedy of just compensation when a local government entity has

(a) imposed arbitrary, excessive, and unconstitutional land use regulations;

(b) commenced, but later abandoned direct acquisitive efforts under its power of eminent domain when its

public purpose was satisfied by the restraints of the purported regulations; and

(c) through a continuing course of conduct acted so as to deprive the property owner of all practical, beneficial or economic use of its property;

and the property owner has so established as a matter of fact after full trial of the issues?

2. Is not a remedy in money damages for inverse condemnation for a property owner aggrieved by oppressive regulatory activity under the guise of the police power mandated by

(a) sound public policy, as an indispensable check against the arbitrary and capricious excesses of local government land use regulation masquerading under the banner of the police power;

(b) an unbroken line of federal decisions, interpreting and applying the United States Constitution; and

(c) the express guarantees of the Fifth and Fourteenth Amendments to the United States Constitution?

3. Is the purported invalidation remedy proffered by the California state courts a constitutionally adequate substitute for just compensation where the conduct complained of by the property owner is not a single regulation, but a continuing course of conduct, including arbitrary and capricious planning and zoning activities, intertwined with acquisitive intent, and punctuated by abortive direct condemnation efforts?

4. Does either the purported social desirability of unfettered planning discretion or the potential inhibiting financial force of inverse condemnation damages warrant or permit the

California courts to deny a property owner just compensation for the taking of private property for public use as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, as well as applicable portions of the California statutes and San Diego ordinances and resolutions are set forth in Appendix K.

STATEMENT OF THE CASE

Appellant in 1966 assembled a 412 acre parcel of land for possible future construction of a power plant. The property was zoned at the time of acquisition as M-I-A (industrial) and A-1-1 (agricultural holding), and the General Plan of the City of San Diego adopted in 1967 and reaffirmed through 1972, designated the property as industrial. The property that is the subject of this suit is approximately 206 acres of this parcel, 25 actually acquired from the City of San Diego in 1966. The land is located in the Sorrento Valley area of San Diego, in a relatively flat area at low elevation. A portion of it is subject to tidal action from the Pacific Ocean and other portions subject to "ponding" or standing water, due to poor drainage. The entire parcel has only sparse vegetation due to the soil's high salt content. The land is unoccupied except for utility lines.

Considerable industrial development took place in the Sorrento Valley area from 1966 through 1972. A January 1972

report, "San Diego Industry 1969-1990, A Planning Analysis," identified the Sorrento Valley area was one of the most desirable areas in the city for industrial expansion.

Commencing in early 1972, the City of San Diego began to formulate a plan to preserve and maintain open space in order to meet state statutory requirements.[1]

In March of 1972 the San Diego City Council met and asked the City Planning Director and the City Attorney to determine a schedule of areas that the City could preserve as open space by rezoning. Throughout 1972 the City's plans for acquisition of open space land continued, including discussions of an open space bond issue for the November election. The City Council in August of 1972 initiated a rezoning of the subject property in Sorrento Valley from M-1-A (industrial) to A-1-10 (agricultural holding) or other appropriate zone. The open space bond issue on the November 1972 ballot failed.

The General Plan of the City of San Diego was also being revised to provide for an open space element which State law required to be adopted by June 30, 1973. A portion of the subject property was designated as open space for public acquisition.

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[1] The California Legislature in the late 1960's and early 1970's adopted a panoply of legislation pertaining to acquisition of "open space" land by local governments, which it declared to be a "public use" for which use of the power of eminent domain was authorized. (Government Code Sections 6950 *et seq.*) In 1972, legislation was enacted which required cities to adopt a General Plan with open space elements (Government Code Section 65302.2) and to adopt an open space zoning ordinance (Government Code Sections 65910-12). See Appendix K.

Concurrent with these changes in the General Plan, efforts were being made in the City's Community Development Department for the funding of open space acquisitions in preparation for a September, 1973 election. The acquisition cost of 120 acres of the subject land was estimated to be $900,000.

On April 17, 1973 the City Council adopted a resolution of public convenience and necessity, (Resolution No. 207761, Appendix K-8) and proposed a $22.5 million bond issue for acquisition of park reserve areas to be approved at the September, 1973 municipal election. No properties were specifically described, but the subject property was subsequently shown on maps publicizing the election as one of the properties to be acquired, as the trial court found and the California Court of Appeal affirmed. (Finding of Fact No. 24, Appendix A-7; original Court of Appeal Opinion, Appendix B-12).

In April, 1973 the Planning Commission held public hearings regarding the rezoning of property for "open space." The Commission recommended a downzoning of a portion of the subject property (approximately 39 acres) from industrial to agricultural, but recommended that a substantial portion (approximately 77 acres) remain designated as industrial and that a further segment (approximately 50 acres) be considered for future industrial use on the submission of a specific plan for development.

The Planning Commission scheduled its first public hearing on the new open space element to the City's General Plan for May 16, 1973. The plan as submitted proposed to designate only a portion of the subject property as open space, roughly the same portion as previously downzoned by the Planning Commission (approximately 39 acres). Because the proposed

plan was only made available to the public 24 hours before the hearing, a continuance was granted.

Representatives of the Planning Department and the Community Development Department realized at the time of the May 16 hearing that the plan did not conform to the plan being developed for the proposed bond issue. Revisions were made in an effort to coordinate the plans. The effect of the revision was to include the entirety of the subject property under the "open space" designation. When the continued hearing was held on May 23, 1973, the maps contained in the report, which was submitted to the Planning Commission and to the public, still erroneously reflected the earlier indication that only approximately 39 acres were to be designated as open space. No mention was made that the exhibits had been altered and, in fact, the property owner was unaware that a change had been made, and of the impact of that change on its property. The revised open space plan was adopted by the Planning Commission.

The City Council on May 30, 1973 received the report from the Community Development Department pertaining to the bond issue, entitled "Staff Report, Park Reserve Systems, April 29, 1973." The report designated substantially all of the subject property for acquisition as open space.

On June 7, 1973, the City Council accepted the recommendation of the Planning Commission and downzoned a portion (approximately 39 acres) of the subject property, but retained a substantial portion of the property in the industrial zone and retained a further portion as recommended for consideration as future industrial.

The new open space element of the City of San Diego's General Plan was presented to the City Council on June 19, 1973. The maps that were distributed to each member of the Council and the members of the public similarly contained the erroneous designation of the area to be included in the open space area, although the large scale wall maps had been corrected. No mention of the discrepancy was made on the public record. The open space plan was adopted as presented. The resultant effect was that the City Council designated as open space on June 19, 1973, property which it had only twelve days earlier specifically reviewed and recommended for retention in industrial zoning.

Testimony received from expert witnesses at the trial established that after the open space element was adopted, the land had no practical, beneficial or economic use, since no use which was consistent with the open space designation was economically or practically feasible.[2] The property at the time

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[2] The definition of "open space" in the City's General Plan is: "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

San Diego Municipal Code section 61.0601 defines open space as: "any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the 'Progress Guide and General Plan for the City of San Diego' as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

There was testimony from expert witnesses that the City required zoning to be consistent with the General Plan.

of trial, and today, is devoted solely to public use as open space, the use for which acquisition was sought by the City. Since the imposition of the open space designation, no further efforts have been made by the City to acquire the property through direct exercise of its power of eminent domain.

The trial court found and the Court of Appeal affirmed that, as a matter of fact, it would have been totally impractical and futile for the property owner to have applied for approval of any development on the portion of the property designated as "open space." (Finding of Fact No. 32, Appendix A-8; original Court of Appeal opinion, Appendix B-12).

The trial court found that the actions of the City of San Diego were:

> "motivated to achieve a public purpose . . . were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial, or economic use of the property . . . and, therefore . . . constitute a taking without due process of law and just compensation within the meaning of the California and United States constitutions. . . ." Conclusion of Law No. 1, Appendix A-8.

The judgment of the trial court was appealed by the City, and originally affirmed by the California Court of Appeal, Fourth Appellate District, Division One. See Appendix B.

The California Supreme Court granted hearing but later retransferred the case back to the Court of Appeal to be

reconsidered in light of its recent decision in *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979).[3]

The Court of Appeal on reconsideration reversed the judgment, holding that a property owner may never sue in inverse condemnation and seek compensation for the exercise of the police power by a government entity, even though the challenged regulations and actions are excessive, arbitrary, unconstitutional and deny the property owner all use of its land.

HOW THE FEDERAL QUESTION IS PRESENTED

Appellant in its complaint alleged that the actions of the City of San Diego leading up to and including the zoning of its property for agricultural and manufacturing, but including it within the open space designation of the General Plan of the City of San Diego, was a "tak[ing] of plaintiff's property for public use without compensation."

The San Diego County Superior Court found that the actions of the City "taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just compensation within the meaning of the California and the United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property." Appendix A.

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[3] Appeal of the *Agins* case to this Court has been docketed as 79-602. This case was a companion case with the *Agins* case at the California Supreme Court. When probable jurisdiction is noted in *Agins*, it may be desirable to consider the similarity of issues presented by these two cases. It is noted that while *Agins* is a pleading case, this case presents a full factual record after trial.

The Court of Appeal in its original review of the judgment found that the combination of the zoning of the property, its inclusion in the open space element, the City's policy of requiring consistency between zoning and the general plan, plus the City's efforts to acquire the land for open space had deprived the owner of the beneficial use of the land, concluding, "this is an example of inverse condemnation and the landowner should, under the Constitution, be compensated." Appendix B.

The California Supreme Court, after having granted a hearing in this case, rendered its decision in *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979) in which it held:

> "A local entity's exercise of its police power which, . . . may exceed constitutional limits [does not] necessitat[e] the payment of compensation." 24 Cal.3d at 272.

Giving lip service to the fact that the Fifth Amendment of the United States Constitution prohibited the taking of private property for public use without just compensation, the Court nonetheless concluded, "the need for preserving a degree of freedom in the land use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuades us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief. . .", describing compensation as an "undesirable remedy." 24 Cal.3d at 274, 276-77.

When the Court of Appeal reconsidered the instant case, upon retransfer from the California Supreme Court, it reversed the judgment of the trial court (as well as "reversing" its own earlier opinion), finding,

> "A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus (*Agins v. City of Tiburon, supra,* 23 Cal.3d 605, 611.)" Appendix G-4.

Despite the urgings of Appellant in its petition for rehearing that the court's holding was a refusal to recognize appellant's federal cause of action based on the Fifth and Fourteenth Amendments of the United States Constitution, seeking compensation for arbitrary and unreasonable land use regulation, rehearing was denied.

The California Supreme Court likewise ignored appellant's urgings that the opinion below was a denial of its constitutional remedy of just compensation grounded on the Fifth and Fourteenth Amendments to the United States Constitution.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. Probable Jurisdiction Should Be Noted Because Of The Pervasive Importance Of The Issues Presented.

The case at bench presents the issue of the appropriate remedy when there has been an uncompensated taking of private property through the land use regulations of a governmental entity.

The increasing use of a variety of land use regulations, including the preservation of open space, on the theory that it is a physical, social, aesthetic, economic and ecological asset has created a whole new set of constitutional problems which must

be addressed by this Court. While past decisions of this Court have recognized in other areas of governmental action that regulation which goes too far is an unconstitutional taking for which just compensation must be paid (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)), the Court has not established the necessary constitutional guidelines in the area of land use regulations. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), this Court noted that the line of demarcation between permissible regulation and an unconstitutional taking, for which the government is "to pay," must be decided on the facts of each individual case.

However, the California state courts have now held that when any regulation is imposed in connection with land use planning, *i.e.*, a purported exercise of the police power--even if unlawful--even though *all* use is denied the property owner--no monetary compensation is ever available, and instead the property owner is restricted to possible invalidation of the regulatory action by seeking administrative mandamus or declaratory relief.

The California Supreme Court in *Agins v. City of Tiburon*, *supra*, 24 Cal.3d 366, the case which formed the basis for the opinion by the California Court of Appeal in this case, found that in the land use regulation area, policy considerations made inverse condemnation and compensation an "inappropriate and undesirable remedy," even where substantially "all use of the land" is forbidden. 24 Cal.3d at 274. The reason for such a rule, according to the Court, was to permit community planners flexibility in their work on the premise that the threat of "unanticipated financial liability" would intimidate and discourage them. 24 Cal.3d at 276. Such a view ignores that governmental actions and decisions in the land use regulation

area necessarily have *constitutional* consequences. The good intentions and nobility of the goals of preserving the environment and urban aesthetics by designating land as "open space" do not make actions achieving these goals immune from the constitutional mandate that private property cannot be taken for public use without payment of just compensation.

When a property owner is prohibited from using its land for any purpose except the public use of "open space," its land has been effectively "taken" and under the Constitution it is entitled to "just compenstion."

In the instant case the evidence at the trial proved that the land is unsuitable for agricultural use, unusable for residential or any similar purpose, and that its only possible use, industrial, is inconsistent with its designation as "open space," and would not be permitted by the City.

The trial court found that the actions of the City resulted in a "depriv[ation] of all practical, beneficial or economic use of the property" and therefore "constitute a taking . . . without due process of law and just compensation within the meaning of the California and United States constitutions. . . ." (Finding of Fact No. 29 and Conclusion of Law No. 1, Appendix A). Nonetheless, the California Court of Appeal found that this action "does not require compensation, rather the party's remedy is administrative mandamus." Appendix G-4.

If the decision in this case is allowed to stand, the result will be that all actions by state and local governments in the land use regulation area will be immune from the constitutional imperative that has governed the taking of private property for

all other public purposes, and that is fundamental to the preservation of private property rights.

The issues presented are obviously national in scope, and their resolution will have considerable social and financial consequences both for those who, like Appellant, own properties designated as "open space" and for all other owners of private property who may now or in the future be subjected to restrictive land use regulation. This Court has never intimated, let alone held, that the constitutional requirement of just compensation has any diminished application when private property is taken to preserve "open space" or for any other land use regulatory objective. It is plain, therefore, that this case properly raises substantial constitutional questions pervasive in scope and critical in effect, which urgently require this Court's resolution.

Appellant makes no assertion that all downzoning or rezoning to a less intense use is a basis for inverse condemnation, nor that the mere adoption of a restrictive general plan amounts to a "taking." What is challenged is the novel theory that land use regulations, valid or invalid, excessive or reasonable, somehow present different considerations than other regulation cases and thus no remedy in inverse condemnation or compensation is *ever* available. If this California theory of social expediency is allowed to stand, a substantial exception will have been carved out from the protection of the Fifth Amendment, and private property rights as they have been known for more than two centuries in this country will not be preserved in California.

2. The Social Experiment Of The California Supreme Court In The *Agins* Case Has Effectively Repealed Private Property Rights In California.

Justice Clark, dissenting in *Agins, supra,* captured the essence of the social experiment initiated by the California Supreme Court as follows:

> "Today's decision effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation." 24 Cal.3d at 282.

The California Supreme Court, apparently motivated by social expediency in "preserving a degree of freedom in the land-use planning function," and avoiding "the inhibiting financial force" of inverse condemnation (24 Cal.3d at 276), by judicial *tour de force* wrought a transformation of the concept of private property rights in California. Justice Clark quite astutely distilled the essence of the effect of the Court's holding, in noting that it is no longer accurate to characterize ownership of property in California as fee simple ownership, but rather that ownership of property in California is in trust from the applicable legislative body, along the lines of classical socialized property rights theory.

Justice Clark, again in his dissent in *Agins, supra,* directly and correctly pointed out the error of the majority's ways when it ignored or flaunted express federal constitutional authority to the contrary:

> "While the majority of this Court can finally declare that such a taking does not offend local constitutional prohibitions, their judgment does not foreclose federal constitutional examination. It is clear that compelling federal authority requires compensation for the taking alleged by plaintiffs in this case. The United States Supreme Court will hopefully adhere to Justice Holmes' admonition that 'we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'" 24 Cal.3d at 282.

Not only is the position of the California Supreme Court in *Agins* in contravention of federal constitutional law, but it is also unsupported by California legislation. The California legislature in enacting the open space legislation expressly limited its effect upon private property rights. California Government Code § 65912, Appendix K-4. Thus, the property owner's rights were trampled in two ways -- the California Supreme Court ignored controlling Federal law and did not even follow the dictates of its own state legislation.

The proffered substitute remedy is, in fact, a non-remedy -- no remedy at all.

In an attempt to justify its radical departure from precedent and its apparent contempt for the Supremacy Clause, the California Supreme Court suggested that the property owner's remedy was to seek invalidation of the offending regulations by administrative mandamus or declaratory relief. There is no authority for this proposition and the property owner in no way concedes that private property rights may be so diluted.

But even if the concept were acceptable, it is clear that, as a matter of fact, the purported substitute for just compensation is constitutionally inadequate. The case at bar well illustrates the sophistry of this approach. Despite the fact that the California Court of Appeal *twice* found a "taking" in the constitutional sense, it did not grant the property owner relief. Rather, more than six years after the twice conceded confiscation, after the property owner had already been subjected to *four* separate levels of judicial review, the court once again set the frustrated property owner adrift, like Diogenes, in search of its illusory remedy.

3. The Decision Below Is In Conflict With Federal Case Law and Prior Decisions Of This Court.

The prior decisions of this Court have made it clear that a property owner can maintain a federal cause of action in state court seeking compensation for arbitrary and unreasonable land use regulation. Only last term, this Court expressly held that such a cause of action could be stated against the Tahoe Regional Planning Agency, a bi-state regional agency with land use regulation powers. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* ___ U.S. ___, 99 S.Ct. 1171 (1979). The Ninth Circuit Court of Appeals, where the *Lake Country Estates* case was encaptioned, *Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir. 1978), while dismissing the claim on the ground that the Regional Agency itself had absolute immunity from liability, did find that the property owner had alleged a cause of action and relied on the due process clauses of the Fifth and Fourteenth Amendments by using the term "taking." 556 F.2d at 1359 n. 9. On appeal, this Court reversed, finding no absolute immunity, specifically

noting that it found sufficient allegations of deprivation of federally guaranteed rights under color of state law. 99 S.Ct. at 1176-77.

Richmond Elks Hall Assn. v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977) illustrates the prevailing view of federal courts with respect to recovery of money damages for interference with property rights by the exercise of the police power:

> "When a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of property, the result is a taking in the constitutional sense and *compensation must be paid.* [Citations omitted.]
>
> '[T]o constitute a taking under the Fifth Amendment it is not necessary the property be absolutely "taken" in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a direct interference or disturbance of property rights. *Pumpelly v. Green Bay Co.*, [80 U.S.] 13 Wall. 166, . . .; *United States v. Lynah*, 188 U.S. 445 . . .; *United States v. Cress*, 243 U.S. 316. . . . Nor need the government directly appropriate the title, possession or use of the properties. . . .' [Citation omitted.]
>
> . . . .
>
> [W]e conclude that Agency's interference with Elks' property rights was direct and substantial, and that the result of this interference was a significant reduction in the value of the subject

> property. Therefore, we hold that Agency effected a *compensable taking* under the Fifth and Fourteenth Amendments of the United States Constitution." 561 F.2d at 1330-31. (Emphasis added.)

Moreover, the court in the *Richmond Elks* case expressly rejected an argument that there could be no liability for government actions taken pursuant to the police power:

> "Regarding Agency's argument that it acted pursuant to the police power of the State and therefore is not liable for its taking of Elks' property, we observe that the very authority cited by Agency, *Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), refute its contention. Berman* involved the rights of property owners whose properties were taken by a redevelopment agency pursuant to the exercise of the State's police power. Under such circumstances the Court observed that '[t]he rights of these property owners are satisfied when they receive that just compensation which Fifth Amendment exacts as the price of the taking.' *Id.* at 36, 75 S.Ct. at 104. It is clear from *Berman* that a governmental agency acting pursuant to the State's police power must pay just compensation for any taking it effects. Therefore, assuming *arguendo*, that Agency in the instant case exercised legitimate police power, it still must pay for its taking of Elks' property." 561 F.2d at 1332.

Prior decisions of this Court, considering government conduct in relation to private property rights, have made it plain that the actions of governmental entities which effectively preclude the property owner from using its land, accomplishing

a public purpose, without providing just compensation, are constitutionally impermissible.

In *Armstrong v. United States,* 364 U.S. 40, 49 (1960) this Court explained:

> "The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Justice Holmes observed in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) that while the government could not survive if it was required to pay for every change, nonetheless there must be limits to the exercise of the police power or the due process clause would be gone:

> "When it reaches a certain magnitude, . . . there must be an exercise of eminent domain and compensation to sustain the act. . . .
>
> . . . .
>
> [T]he natural tendency of human nature is to extend the qualifications more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public

> condition is not enough to warrant achieving the desire by shorter cut than the constitutional way of paying for the change." 260 U.S. at 413-15.

The *Pennsylvania Coal Co.* case was approvingly cited by this Court recently in *Penn Central, supra,* 438 U.S. 104, as holding that a state statute which furthers important public policies may nonetheless so frustrate the economic expectations of the owners as to amount to a "taking." This Court in *Penn Central* further noted that such injuries caused by the government action are to be "compensated" for, and the government is "*to pay* for any losses proximately caused by it. . . ." 438 U.S. at 124. (Emphasis added.)

While the explanation for the illicit constitutional reformation attempted by the California courts may lie largely in the well-publicized financial implications of Proposition 13, which has produced an era of fiscal conservatism throughout the state, neither affluence nor penury determines the reach of basic constitutional guarantees. This Court long ago recognized that the "political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." *United States v. Cors,* 337 U.S. 325, 332 (1949). The right to receive just compensation for private property that has been taken for public use has long been exhaulted as an essential protection against governmental abuse and discrimination, (*Pumpelly v. Green Bay Co.,* 80 U.S. (13 Wall) 166, 177-78 (1871)); and the "vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis,* 373 U.S. 526, 537 (1963).

CONCLUSION

This Court has eloquently stated its concept of private property rights and the protections to which they are entitled under the Constitution:

> "[T]he [supposed] dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

A view totally repugnant to this Court's mandate holds sway in California today. Private property rights are being "judicially reformed" into feeble privileges or less and controlling federal law essential to the preservation of the fundamental constitutional right in property is being ignored by the California courts. This Court's intervention is urgently required.

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

LOUIS E. GOEBEL

LUCE, FORWARD, HAMILTON & SCRIPPS

Counsel for Appellant

October, 1979

Supreme Court, U. S.
FILED
OCT 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, *et al.*,
Appellees.

On Appeal From The Supreme Court Of California

APPENDIX TO JURISDICTIONAL STATEMENT

LOUIS E. GOEBEL
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California 92101
Telephone: (714) 236-1414
Counsel for Appellant

October, 1979

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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APPENDIX A

(1) **Findings of Fact and Conclusions of Law of the San Diego County Superior Court, dated April 9, 1976**

(2) **Judgment of the San Diego County Superior Court, dated October 8, 1976**

FILED
Robert D. Zumwalt, Clerk
APR 9 1976
BY S. KENDALL, Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation, et al., Defendants.	NO. 357022 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on January 19, 1976, in Department 26 of the above-entitled Court, the Honorable Jack R. Levitt, Judge, presiding, Louis E. Goebel appeared as counsel for plaintiff, San Diego Gas & Electric Company, and C. Alan Sumption appeared as counsel for defendant, City of San Diego, a municipal corporation.

The matter having been previously bifurcated to require trial of the question of liability first and a jury having been demanded by plaintiff, the Court heard argument and received briefs on the question of entitlement of plaintiff to a jury in the liability phase of the trial. The matter was submitted to the Court for decision, and the Court determined that the plaintiff was not entitled to a jury in the liability phase, but was entitled to a jury for the damage phase.

The liability phase proceeded without a jury. Witnesses were sworn and evidence, both oral and documentary, was introduced. The evidence in the liability phase being closed, and the question of liability having been submitted to the Court for decision, and, after deliberation thereon, the Court now renders its decision in writing and makes the following Findings of Fact and Conclusions of Law on the question of liability:

FINDINGS OF FACT

1. Plaintiff San Diego Gas & Electric Company is a corporation with its principal place of business in San Diego County, California, and is the legal owner of the real property which is the subject of this action.

2. The defendant City of San Diego is a municipal corporation possessing the power of eminent domain.

3. In April of 1966, plaintiff acquired approximately 412 acres of property in the Sorrento Valley area of the City of San Diego as an assemblage after extensive negotiation. The portion of this property located south of Carmel Valley Road and west of Interstate 5 is the subject of this action and is the property acquired by plaintiff in April of 1966, except that portion east of Sorrento Valley Road and the 12 acres west of the railroad right of way and which is graphically described in Exhibit "A", attached hereto and made a part hereof by this reference.

4. Approximately 25 acres of the subject property was acquired from the defendant City at fair market value of approximately $5,200 per acre.

5. The northwesterly portion of the subject property is subject to tidal action from the Pacific Ocean and is sometimes referred to as the

Los Penasquitos Lagoon. A great portion of the subject property is not subject to tidal action nor salt water intrusion, although it is subject to fresh water ponding in the wet season. There exists only sparse vegetation on the property. It is presently and has been since 1966 vacant except for some utility lines which traverse it.

6. In 1966, approximately 116 acres of the subject property was zoned M-1-A (industrial), and most of the balance was zoned A-1-1 (agricultural holding).

7. The General Plan of the City of San Diego, first adopted in 1967, designated almost all of the subject property for industrial use, and this designation has been reaffirmed consistently with the last readoption in January of 1972.

8. In 1966, considerable industrial development had taken place in the Sorrento Valley area immediately to the southeast of the subject property, and this development continued apace through 1973 and to the present so that the industrial development is substantially filled out up to the subject property.

9. In the late 1960's, a proposed plan of lands in the City which might be acquired for open space was prepared by the Planning Department of the defendant City, and a portion of the subject property was included therein.

10. On March 16, 1972, a conference meeting of the San Diego City Council was held on the subject of open space. Particular reference was made to the acquisition of open space and a bond issue was discussed. A motion was passed directing the Planning Director and the City Attorney to proceed to determine a schedule of those open space areas which they felt they could proceed to rezone.

11. In July of 1972, the City Council held another conference on the subject of open space and specifically discussed an open space bond issue for the November, 1972, election.

12. On August 10, 1972, the City Council of the defendant City initiated a rezoning of the subject property from M-1-A to A-1-10, or other appropriate zone.

13. The open space bond issue on the November, 1972, ballot failed.

14. In late 1972 or very early in 1973, the Planning Department of the defendant City commenced preparing an open space element to the City's General Plan as required to be adopted by State law by June 30, 1973. The draft open space element designated a portion of the subject property which was then zoned M-1-A as open space for public acquisition.

15. At the same time, the Community Development Department of the defendant City was carrying out detailed planning for the funding of open space acquisition, and specific estimated costs of acquisition of specific properties were being estimated. This effort was in preparation for another open space bond issue scheduled for the September, 1973, municipal election. One estimate reported was the acquisition of 120 acres of the subject property for a cost of $900,000.00.

16. On April 17, 1973, the City Council of the defendant City adopted a resolution of public convenience and necessity regarding the acquisition of park reserve areas. This resolution did not contain descriptions of specific properties, but referred to a 22.5 million dollar bond issue being proposed for the September, 1973, municipal election. Subsequently, the publicity for this bond issue identified the subject property as one of the properties to be acquired, and

newspaper articles appeared prior to the election with maps showing the outlines of the subject property and indicating its acquisition.

17. On April 11, 1973, the Planning Commission of the defendant City held a public hearing on the proposed rezoning of the subject property, and the Planning Commission recommended down-zoning of a portion of the subject property, approximately 39 acres, from M-1-A to A-1-10, but recommended that a substantial portion, approximately 77 acres, remain M-1-A, and that a further segment, approximately 50 acres, remain A-1-1, but be considered for future industrial use on submission of a specific plan for development.

18. On May 16, 1973, the Planning Commission of the defendant City held its first public hearing on the new open space element to the City's General Plan which was entitled, "A Plan for the Preservation of Natural Parks for San Diego". Plaintiff and others had only received the proposed plan less than 24 hours before the hearing, and, accordingly, a continuance was requested and ultimately granted to May 23, 1973. The plan as submitted proposed to designate only the northerly portion of the subject property as open space.

19. At the May 16, 1973, hearing, M. David Smith of the Planning Department, and James McLaughlin of the Community Development Department, compared notes and determined that the plan proposed by the Planning Department did not conform to the plans being developed in the Community Development Department for use in conjunction with the bond issue. Mr. Smith had been previously instructed by his superiors to conform the Planning Department's open space efforts to those of the Community Development Department. Accordingly, Mr. Smith directed his associate, Mr. Stang, to coordinate with the Community Development Department and to make the open space element designations conform to those of the Community Development Department for acquisition by bond issue.

Mr. Stang did so and revised the large wall exhibit maps which were on display at the Planning Commission hearing. The effect of the revision as to the subject property was to include all of the subject property except that east of Sorrento Valley Road and the 12 acres west of the railroad right of way. However, there was not sufficient time before the next hearing to reprint the maps contained in each report which had been submitted to the Planning Commission and to the public. Accordingly, they were left in their existing form.

20. On May 23, 1973, the continued hearing on the open space element was held before the Planning Commission. No mention was made on the public record that the wall exhibits had been altered, and plaintiff was totally unaware that the change had been made and of its impact with respect to the subject property. The open space element was adopted by the Planning Commission in the form presented.

21. On May 30, 1973, the City Council of the defendant City held another Council conference and received the report from the Community Development Department regarding the bond issue. The efforts of the Community Development Department had culminated in a report entitled, "Staff Report, Park Reserve Systems, April 29, 1973". This report discussed the means of funding acquisition of property for open space and specifically designated substantially all of the subject property for acquisition as open space.

22. On June 7, 1973, the City Council of the defendant City accepted the recommendation of the Planning Commission and thereafter rezoned a portion of the subject property from M-1-A to A-1-10, while retaining a substantial portion in the M-1-A zone and further retaining a portion of the A-1-1 zone with a recommendation for consideration for future industrial upon submission of a specific plan for development.

23. On June 19, 1973, the City Council of the defendant City held a public hearing for adoption of the open space element to the City's General Plan. Again, individual revised maps were not prepared nor distributed. Rather, the corrected wall exhibits were displayed. The copies of the open space element which each member of the City Council and members of the public held contained the erroneous map designation. No mention of this discrepancy was made on the public record, and the open space element was adopted as presented.

24. Plans were finalized for inclusion of an open space bond issue on the September 18, 1973, municipal election ballot. During the campaign leading up to this election, various presentations and publicity depicted the subject property as property to be acquired for public use by designating it on various graphic representations utilized.

25. The September 18, 1973, bond issue failed.

26. Following the September, 1973, election, the defendant City deleted the subject property from its priority list of proposed open space acquisitions.

27. In the condition that existed prior to June of 1973, the highest and best use of the property taken was for use as an industrial park and related buffer areas.

28. In the aforesaid condition, before the actions of the defendant City in June of 1973, the property had a substantial fair market value.

29. The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has

further suffered severance damage with respect to the balance of the subject property.

30. No development could proceed on the property designated as open space unless it was consistent with open space. In light of the particular characteristics of the said property, there exists no practical, beneficial or economic use of the said property designated as open space which is consistent with open space.

31. Since June 19, 1973, the property designated as open space has been devoted to use by the public as open space.

32. Following the actions of the defendant City in June of 1973, it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space or the remainder of the subject property.

33. Since the actions of the defendant City in June of 1973, the property designated as open space and the remainder of the larger parcel is unmarketable in that no other person would be willing to purchase the property, and the property has at most a nominal fair market value.

CONCLUSIONS OF LAW

1. The actions of defendant City against plaintiff's property were motivated to achieve a public purpose, namely, preservation of open space, without payment of just compensation and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just

compensation within the meaning of the California and United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property.

2. Plaintiff is entitled to judgment against defendant City of San Diego for money damages in an amount to be determined by the fair market value of the property designated as open space on June 19, 1973, considered without regard to the open space designation, together with damages to the remainder parcel or parcels, together with plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal and engineering fees actually incurred.

TRIAL

The trial of the damage phase of this action before a jury is hereby set for May 3, 1976, at 10:00 a.m., in Department 26, San Diego County Superior Court.

DATED: APR 9 1976.

JACK R. LEVITT

JUDGE OF THE SUPERIOR COURT

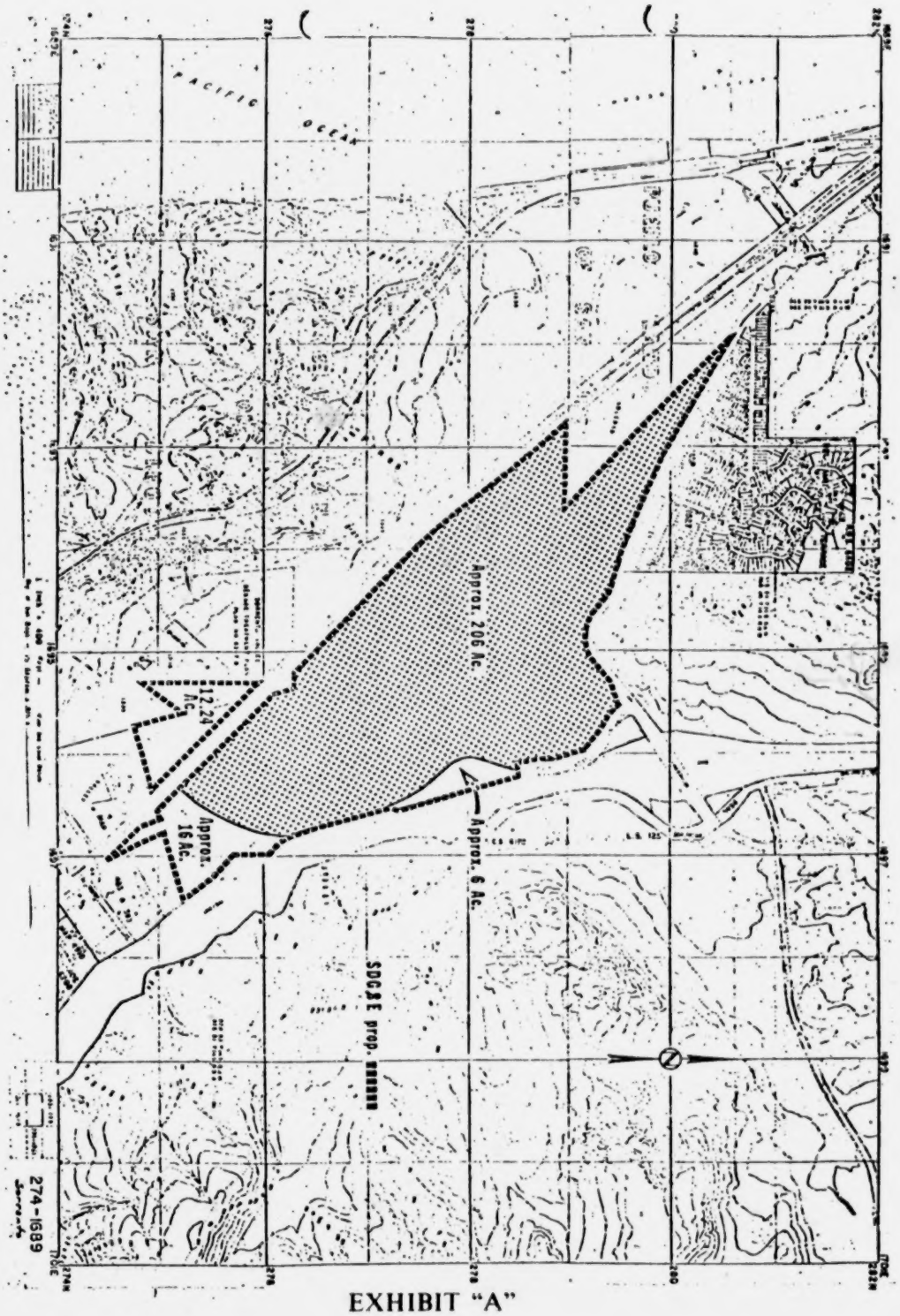
PACIFIC OCEAN
Approx. 206 Ac.
112.24 Ac.
Approx. 16 Ac.
Approx. 6 Ac.
SDG&E prop.
274-1989

EXHIBIT "A"

LAW OFFICES
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 THE BANK OF CALIFORNIA PLAZA
110 WEST A STREET
SAN DIEGO, CALIFORNIA 92101
(714) 236-1414

FILED
Robert D. Zumwalt, Clerk
OCT 8 1976
BY J. KENDALL, Deputy

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation, et al., Defendants.	No. 357022 JUDGMENT IN INVERSE CONDEMNATION

This cause came on regularly to trial on January 19, 1976, in Department 26 of the above-entitled court, the Honorable Jack R. Levitt, Judge, presiding, Louis E. Goebel appeared as counsel for plaintiff SAN DIEGO GAS & ELECTRIC COMPANY, and C. Alan Sumption appeared as counsel for defendant CITY OF SAN DIEGO, a municipal corporation.

The matter had been previously bifurcated to require the question of liability to be tried to the court and the issue of just compensation being thereafter determined by the jury.

Findings of Fact and Conclusions of Law were executed and filed herein which provided, *inter alia,* that the activities of defendant CITY with respect to plaintiff's property constituted a taking of that portion of plaintiff's property described on Exhibit A attached hereto and made a part hereof by this reference, and that plaintiff was entitled to damages in the amount of the fair market value of the property taken as of June 19, 1973, and damages to the remaining lands of plaintiff.

The court having instructed the jury as to the law of the case, submitted to the jury a form of verdict and instructed the jury to ascertain and assess the fair market value of the subject property as of June 19, 1973, as their verdict in said cause. The jury retired and did consider said matter and thereafter returned into court for their verdict in said action and returned said form of verdict so submitted to them, which verdict was as follows:

> "We, the jury in the above-entitled action, find that,
>
> 1. The fair market value of the property taken is $2,886,300.00.
>
> 2. The severance damages to the remainder of plaintiff's property after acquisition are $283,696.00."

Said verdict was then and there, on May 20, 1976, duly entered and filed, and the court having made its Findings of Fact and Conclusions of Law as to all other matters, questions and issues involved in the proceeding;

And it further appearing to the court that the use to which the property was taken and is to be applied is a use authorized by law, and that the taking of the same is necessary to such use; and that the taking of the property occurred on June 19, 1973;

NOW, THEREFORE, by reason of the law in the premises and the evidence of the verdict aforesaid,

IT IS HEREBY ORDERED AND ADJUDGED that the value of plaintiff's real property taken by defendant, as fixed by the jury, was on June 19, 1973, the sum of $2,886,300.00, together with damages to the remainder of plaintiff's property, after severing from said property the part taken, in the amount of $283,696.00, for the total amount of $3,169,996.00;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff is entitled to and does hereby recover interest on said amount of $3,169,996.00 at the legal rate of seven percent (7%) per annum from and after June 19, 1973 to the date of entry of judgment;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff is entitled to and does hereby recover its appraisal fees in the amount of $41,094.53; its engineering fees in the amount of $41,779.54; and its attorneys' fees in the amount of $39,685.00;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff recover its costs of suit herein;

IT IS FURTHER ORDERED AND ADJUDGED that payment to the court of the sum of money specified above is in full payment for the real property so taken, and for damage to the remaining lands of plaintiff suffered by reason of the taking of the property;

IT IS FURTHER ORDERED AND ADJUDGED that the real property taken is described more particularly on Exhibit A attached hereto and incorporated herein by this reference.

DATED: OCT 8 1976

JACK R. LEVITT

JUDGE OF THE SUPERIOR COURT

SORRENTO PROPERTY

Those certain portions of Pueblo Lots 1339 and 1362 of Pueblo Lands of San Diego, according to the Map thereof made my [*sic*] James Pascoe in 1870, a copy of which said map was filed in the office of the County Recorder of San Diego County November 14, 1921 and is known as Miscellaneous Map No. 36, TOGETHER with those portions of Section 30, Township 14 South, Range 3 West and Section 25, Township 14 South, Range 4 West, according to Official Plat thereof in the City of San Diego, County of San Diego, State of California, all being described as a whole as follows:

Beginning at the Northwest corner of Lot 4 of said Section 25; thence along the West line thereof, as said West line is shown on Record of Survey Map No. 6852, filed in the office of the County Recorder of said County of San Diego, South 0° 20′ 44″ West, 55.23 feet to an angle point in the Southerly line of Del Mar Terrace, according to Map thereof No. 1527, filed in the Office of the County Recorder of said County, being a point in a line which is parallel with and 20.00 feet Southerly, measured at right angles, from the Southerly line of Block 9 of said Map No. 1527; thence along said Southerly line of Map No. 1527 as follows: North 72° 59′ 37″ West, 214.41 feet (record North 73° 58′ West, 214.30 feet); North 67° 32′ 37″ West, 932.59 feet (record North 68° 31′ West, 932.10 feet) and North 60° 13′ 29″ West, 1557.71 feet (record North 61° 16′ West) to the Northeasterly line of the Pueblo Lands of San Diego, known as the Williams' line, according to City of San Diego Engineer's Drawing Nos. 5261-L to 5268-L; thence South 46° 30′ 09″ East (record South 47° 02′ 54″ East) along said Northeasterly line 2564.23 feet to the Northeasterly corner of said Pueblo Lot 1339; thence along the Northerly line thereof North 89° 00′ 29″ West, 917.53 feet to the Northeasterly line of the 150.00 foot wide right of way as conveyed to the Atchison, Topeka and Santa Fe Railway Company, a corporation, by deed dated April 21, 1909 and recorded in Book 461, Page 372 of Deeds; thence along said Northeasterly line South 38° 53′ 12″ East, 1491.02 feet to the beginning of a tangent 5654.65 foot radius curve concave Northeasterly; thence Southeasterly along the arc of said

curve through a central angle of 7° 05′ 08″ a distance of 699.29 feet; thence tangent South 45° 58′ 20″ East, 1448.01 feet to the Southerly line of said Pueblo Lot 1339; thence along said Southerly line South 89° 11′ 20″ East, 111.29 feet and South 88° 57′ 50″ East, 37.19 feet (record South 89° 07′ 59″ East, 148.48 feet) to the Westerly line of said Pueblo Lot 1362; thence along said Westerly line South 14° 28′ 47″ East, 194.43 feet to said Northeasterly line of the 150.00 foot wide right of way conveyed to Atchison, Topeka and Santa Fe Railway Company; thence along said Northeasterly line South 45° 58′ 20″ East (record North 46° 30′ 00″ West), 1545.93 feet to the Southerly line of the Northerly 50 acres of said Pueblo Lot 1362; thence along said Southerly line North 75° 33′ 21″ East, 130.46 feet to the Westerly line of the 100.00 foot wide right of way as condemned by the California Southern Railroad Company in the Superior Court of San Diego County, filed May 24, 1881 in Book 38 of Deeds, Page 438, et seq.; thence along said Westerly line South 22° 45′ 09″ East, 274.87 feet to the beginning of a tangent 2914.93 foot radius curve concave Northeasterly; thence Southeasterly along the arc of said curve through a central angle of 0° 15′ 10″, a distance of 12.86 feet to the Northeasterly line of said 150.00 foot wide right of way conveyed to Atchison, Topeka and Santa Fe Railway Company, being a point on the arc of a 5130.59 foot radius curve concave Southwesterly in said Northeasterly line, a radial line of said curve to said point bears North 45° 42′ 54″ East; thence Southeasterly along the arc of said curve through a central angle of 4° 08′ 00″, a distance of 370.12 feet to a point of cusp with a nontangent 2814.93 foot radius curve concave Northeasterly, a radial line of said curve to said point bears South 59° 51′ 51″ West, said point being a point on the Northeasterly line of said 100.00 foot wide right of way condemned by California Southern Railroad Company; thence Northwesterly along the arc of said curve and along said Northeasterly line through a central angle of 7° 23′ 00″, a distance of 362.74 feet; thence continuing along said Northeasterly line North 22° 45′ 09″ West, 260.27 feet to said Southerly line of the Northerly 50 acres of Pueblo Lot 1362; thence along said Southerly line North 75° 33′ 21″ East, 21.10 feet to a point hereinafter known and designated Point "A", said point being a point in the center line of Sorrento Valley Road; thence continuing North 75° 33′ 21″ East, 716.04 feet to the Southwesterly line of the land described in deed to the State of California, recorded August 12, 1963 as Document No. 141384 of Official Records; thence along said Southwesterly line North 38° 42′ 00″ West, 393.64 feet to an angle point therein; thence North 50° 16′

35" West, 261.96 feet; thence North 1° 04' 56" West, 56.57 feet to the Northeasterly line of said Pueblo Lot 1362, said Northeasterly line being shown on City of San Diego Engineer's Drawing Nos. 5261-L to 5268-L and known as the Williams' line; thence continuing North 1° 04' 56" West, 286.32 feet; thence North 46° 25' 56" West, 189.19 feet; thence North 22° 39' 32" West, 214.89 feet; thence North 15° 42' 27" West, 472.39 feet; thence North 13° 49' 04" West, 392.47 feet; thence North 18° 31' 25" East, 90.14 feet; thence North 15° 10' 00" West, 273.57 feet; thence North 16° 30' 35" West, 639.94 feet; thence North 14° 39' 43" West, 252.83 feet; thence North 27° 31' 06" West, 104.53 feet; thence South 76° 36' 25" West, 72.71 feet to a point herein designated Point "B" being a point in the center line of Road Survey No. 301 (Sorrento Valley Road) according to plat thereof filed in the office of the County Surveyor of said County of San Diego; thence continuing along said boundary of State of California's land South 76° 36' 25" West, 22.96 feet; thence North 10° 51' 04" West, 153.85 feet; thence North 5° 00' 03" West, 206.30 feet; thence North 16° 06' 20" West, 308.65 feet; thence North 48° 09' 57" West, 198.94 feet; thence North 58° 47' 21" West, 246.55 feet; thence North 44° 14' 18" West, 142.99 feet; thence South 69° 12' 12" West, 228.46 feet; thence South 51° 00' 15" West, 242.42 feet; thence North 39° 05' 15" West, 60.00 feet; thence North 51° 00' 22" East, 243.39 feet; thence North 50° 26' 47" East, 85.95 feet (record 57.86 feet to the North line of Lot 4 in said Section 25); thence along said North line North 88° 55' 41" West, 1117.40 feet to the Point of Beginning.

The bearings and distances used in the above description are based on Record of Survey Map No. 6852, filed in the office of the County Recorder of said County, April 26, 1967 as File No. 58393.

Excepting therefrom that portion of Lot 4 in said Section 25, lying Northerly of the center line of Carmel Valley Road, according to Road Survey No. 301, Filed in the Office of the County Surveyor of said County.

ALSO: Excepting therefrom all that portion of the above described property lying Easterly of a line, a portion of which is the center line of Sorrento Valley Road as shown on said Road Survey No. 301, more particularly described as follows:

Beginning at Point "B" described above; thence South 16° 58′ 24″ West, 388.85 feet to the beginning of a tangent curve concave Easterly, having a radius of 400.00 feet; thence Southerly along the arc of said curve through a central angle of 59° 08′ 30″, a distance of 412.89 feet; thence South 42° 10′ 06″ East, 255.16 feet; thence South 33° 01′ 36″ East, 265.00 feet; thence South 22° 01′ 36″ East, 480.00 feet; thence South 16° 09′ 36″ East, 536.00 feet to the beginning of a tangent curve concave Westerly having a radius of 573.70 feet; thence Southerly along the arc of said curve through a central angle of 30° 03′ 00″, a distance of 300.89 feet; thence tangent South 13° 53′ 24″ West, 74.40 feet to a point on the Northeasterly line of said Pueblo Lot 1362; thence South 11° 27′ 14″ West 513.61 feet; thence South 5° 52′ 08″ East, 288.83 feet; thence South 26° 18′ 29″ East, 173.50 feet to said Point "A" described above.

APPENDIX B

Opinion of the California Court of Appeal, Fourth Appellate District, Division One, dated June 13, 1978

SAN DIEGO GAS & ELECTRIC COMPA
NY, Plaintiff and Respondent,

v.

CITY OF SAN DIEGO et al.,
Defendants and Appellants.

Civ. 16277.

Court of Appeal, Fourth District,
Division 1.

May 17, 1978.

As Modified on Denial of Rehearing
June 13, 1978.

Hearing Granted July 13, 1978.

Electric utility sued city in inverse condemnation to recover value of property allegedly taken because down zoning combined with inclusion of tract in open space element of general plan made it impossible to use the land. The Superior Court, San Diego County, Jack R. Levitt, J., rendered judgment for the utility, and the city appealed. The Court of Appeal, Gerald Brown, P.J., held that: (1) subject to exceptions, general rule is that a rezoning which merely reduces market value does not give rise to a cause of action in inverse condemnation; (2) although charter city, which did not adopt implementing ordinances, was not bound by statute requiring zoning to be consistent with general plan, city's policy of "consistency" could be considered; (3) where combination of down zoning plus inclusion of property in open space element, plus "consistency" policy and city's overtures to purchase the property for open space deprived owner of beneficial use thereof, in that because of location and peculiar characteristics of the land it was suitable only for industrial use, which city would not permit, and had no beneficial or economic use except as open space, a compensable taking had occurred; (4) failure to apply for conditional use permit did not bar relief on theory of failure to exhaust administrative remedies since owner was not seeking to develop the land, and (5) award of prejudgment interest was not error.

Affirmed.

GERALD BROWN, Presiding Justice.

The City of San Diego (City) appeals the judgment after the court found it had inversely condemned property owned by San Diego Gas & Electric Company (Company) which the jury valued at $2,886,300. Additionally, the jury found $283,696 severance damages. The court ordered interest of 7% to be paid on the total, $3,169,996, from the date of taking,

June 19, 1973, plus appraisal, engineering and attorneys' fees totaling $122,559.07.

The property is in Sorrento Valley in the northern part of the City, in the southwest quadrant of the intersection of Highway I-5 and Carmel Valley Road between I-5 and the Torrey Pines State Park; it is generally at low elevation, is a drainage basin, tidal basin or flood plain and is subject to standing water or "ponding"; part is subject to ocean tidal action and portions have been referred to as the Los Penasquitos Lagoon, an estuary and wildlife refuge; a portion is within the State Coastal Act zone.

Company assembled the approximately 412-acre parcel in 1966 and then discussed with City its plan to hold the land for possible future construction of a power plant. In 1972 City initiated rezoning hearings for the property which was then zoned industrial (M-1A zone) and agricultural or holding zone (A-1-1); at that time the City General Plan Map designated most of the property as industrial and the remainder as "area for future growth." At the same time, the City Planning Department was preparing an open space plan for the city which ultimately was entitled "A Plan for the Preservation of Natural Parks for San Diego" and included about 230 acres of Company's land. In addition, in early 1973, the Community Development Department prepared a staff report entitled "Park Reserve Systems," which discussed the financing and acquisition of park reserve lands and got estimated values for the proposed park properties, including the property in question here, as part of a bond proposal to be put before the electorate in September 1973.

The City Council, on June 7, 1973, down-zoned some of the land from industrial to A-1-10 and part of the A-1-1 land was designated for future industrial development; the rest of the land in the industrial zone retained its industrial classification.[1] On June 19, 1973 City adopted the open space element of the General Plan which covered all the land found condemned here, about 233 acres. In September 1973, the report of the Community Development Department was received and this property appeared on maps as one of the properties to be acquired if the bond issue passed. It failed. A year later Company filed suit.

The City claims its acts in zoning the property for light industry and agriculture with an open space general plan designation do not constitute a taking or a damaging of property. Company claims City has inversely condemned its land because the zoning regulations

1. From 1966-1973 the property was zoned:

Industrial (M-1A)	116 acres
Agricultural (A-1-1)	112 acres
" holding zone	

After the rezoning, the land was classed as:

Industrial (M-1A)	77 acres
Agricultural (A-1-10)	39 acres
" holding zone (A-1-1) with 50 acres to be considered for future industrial use.	112 acres

combined with the open space element of the general plan has made the property useless. Substantial evidence, introduced during trial, supports the Company's position.

[1] The power of eminent domain is the state's inherent power to take private property for public use (*Rose v. State of California,* 19 Cal.2d 713, 719, 123 P.2d 505). However, the state is limited in exercising this power by Article I, section 19 of the California Constitution which assures the private landowner he will be compensated if his land is taken or damaged.

[2] In some instances the state will appropriate a person's property without paying for it in advance. This may occur in a variety of situations. The government may deliberately destroy private property in the public interest such as when it demolishes buildings to prevent the spread of fire; it may inadvertently damage property in the construction of public improvements; it may decrease the value of a person's property, for example, by constructing a freeway which cuts down light and air to a particular property; or it may decrease the value of a person's property by regulations which limit the use or development of the property. (10 Cal.Law Rev. Commission Reports, Recommendations and Studies, 1970-1971 at pp. 79-81.) In these instances the state is said to have acquired the property through inverse condemnation and the property owner can bring suit to recover the compensation due him.

[3-8] The state derives its authority to zone property from the police power, the government's power to enact regulations to protect the health, safety and welfare of its citizens. Unlike the person whose property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation (*Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515, 530, 20 Cal.Rptr. 638, 370 P.2d 342). In California the general rule is that a rezoning which reduces the market value of the land does not give rise to a cause of action in inverse condemnation (*HFH, Ltd. v. Superior Court,* 15 Cal.3d 508, 514, 125 Cal.Rptr. 365, 542 P.2d 237). However, there are exceptions to the rule. For example, the state may abuse its use of the police power by placing unreasonable or arbitrary regulations on land under the guise of zoning (*Pinheiro v. County of Marin,* 60 Cal.App.3d 323, 326, 131 Cal.Rptr. 633). A regulation may be unreasonable if it deprives the landowner of any beneficial use of his property (*Eldridge v. City of Palo Alto,* 57 Cal.App.3d 613, 624, 129 Cal.Rptr. 575) or if it deprives the owner of his property so it can be used by the public (*Sneed v. County of Riverside,* 218 Cal.App.2d 205, 32 Cal.Rptr. 318). Likewise, if the state down-zones a property to decrease its value as a prelude to later acquiring the property, the zoning may be found to have been a condemnation. Or, if zoning classifications are used to evade the requirement that land used by the public must be acquired by the public, such zoning is condemnation (*HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, 516, fn. 14, 520, 125 Cal.Rptr. 365, 542 P.2d 237). The question whether a particular zoning restriction results in a

taking by inverse condemnation is "a question of fact to be determined by trial of the issue." (*Eldridge v. City of Palo Alto, supra,* 57 Cal.App.3d 613, 628, 129 Cal.Rptr. 575, 584.) On review, the appellate court looks for substantial evidence to support the finding below (*Foreman & Clark Corp. v. Fallon,* 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362).

[9-11] When the government restricts a landowner's use of his property, it is important to determine whether it is doing so under the police power or under the power of eminent domain because this is what governs the question of compensation. However, there is no set formula to distinguish a regulation from a taking or to draw the line where regulation ends and taking begins. Cases which involve the appropriation of land by the state or use of the land by the public clearly demand the state to take title and pay for the taking; cases where the landowner is prohibited from noxious use of his land, for example as a gravel pit,[2] no compensation is due even though the landowner may be effectively prevented from all use of his land. From another point of view, where the government acts in its enterprise capacity, acquiring assets from the citizenry for its own account, as it were, then payment must be made; where the government mediates disputes among competing alternatives, such as prohibiting pigs in the backyard, it is merely regulating the private interests in the community. One commentator has suggested that the compensation clause in the Constitution never was meant to preserve the economic status quo; rather, it is to serve as a curb on arbitrary government action (Sax, *Takings and the Police Power,* 74 Yale L.J., 36, 37-40, 58, 62-63). However, these guidelines are not always of great help in answering whether a governmental action is a regulation or a taking.

[12] Stripped to its bare essentials, we are asked here whether a person with land zoned for agriculture and manufacturing but lying within the open space area of the general plan can be denied all use of his land and denied compensation. Recognizing that a downzoning, as long as it is reasonable, is not a basis for inverse condemnation, what effect does the general plan have?

[13, 14] Zoning and the general plan are closely interrelated because they both deal with land use, but each performs an essentially different function. Zoning is very precise and legally restricts present land use, while the general plan is merely a planning document which is to serve as a guide to future land use. In California general plans are mandatory (Gov.Code § 65300 et seq.); provision is made for their amendment three times a year (Gov.Code § 65361) which highlights the fact that they are not final documents--neither completed nor inflexible. San Diego's General Plan states in the legend:

> "NOTE: this map presents General Plan land use and circulation policies and proposals in a generalized,

2. *Consolidated Rock Products Co. v. City of Los Angeles, supra,* 57 Cal.2d 515, 518, 20 Cal.Rptr. 638, 370 P.2d 342.

graphic form. It is not a zoning map and should not be so construed."

Notwithstanding the differences in their purpose, scope and function, zoning and the general plan become inextricably linked by the passage of AB 1301 which mandates that zoning be consistent with the general plan (Gov.Code § 65860). At the same time, laws were passed requiring that the issuance of building permits, approval of subdivision maps and adoption of open space zoning be dependent on the proposal being consistent with the local open-space element (Gov.Code § 65567). Depending on the jurisdiction's definition of open space, it would be possible for a parcel within the open space element to be zoned light manufacturing as is the case here and still be consistent with the general plan.[3] However, the issue here should be moot since these provisions requiring consistency do not apply to charter cities such as San Diego unless the City has adopted similar ordinances. This the City has not done (Gov.Code §§ 65700, 65803; *Dale v. City of Mountain View*, 55 Cal.App.3d 101, 108, fn. 5, 127 Cal.Rptr. 520). Thus, here, the general plan should be merely a planning document and should not legally bind the City in making land use decisions.

[15-17] Because the general plan lacks definiteness and finality, there can be no claim in inverse condemnation because land falls within a certain category on an adopted plan (*Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 119-120, 109 Cal.Rptr. 799, 514 P.2d 111). The mere "planning in anticipation of a public improvement is not a taking" (*Hilltop Properties v. State of California*, 233 Cal.App.2d 349, 356, 43 Cal.Rtpr. 605, 609). Even an announcement that an agency intends to condemn a property results in a taking only when a city does some unequivocal act which shows it is proceeding with a planned improvement (*Hilltop Properties v. State of California, supra*, 233 Cal.App.2d 349, 356, 43 Cal.Rptr. 605). However, even if a bond issue is proposed and certain properties are singled out for purchase if the bond issue passes, this is not a sufficiently unequivocal act to give rise to an action in inverse condemnation (see *City of*

3. The City's definition of open space makes it less than likely a manufacturing zone would be found consistent with open space. On the general plan "open space" is: "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

Municipal Code section 61.0601 defines open space as: "any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which, in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the 'Progress Guide and General Plan for The City of San Diego' as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

Walnut Creek v. Leadership Housing Systems, 73 Cal.App.3d 611, 622, 140 Cal.Rptr. 690).

[18-20] In summary, the act of downzoning is not compensable unless the regulation is unreasonable or an attempt by the government to lower the value of the land before buying it. Adoption of a general plan does not result in condemnation unless there are additional specific acts which commit the governmental agency to purchase the property. Here there is no legal requirement that the zoning be consistent with the general plan. However, a review of the record shows this was an underlying premise in the court below: expert witnesses testified there must be consistency between zoning and the general plan; counsel for the parties agreed this was the way things were done; City brings to our attention in its briefs the fact it is exempt from the consistency provisions but does not follow through to conclude that the court below made its decision under improper law.[4] As a charter city, San Diego is exempt from the requirements that building permits, subdivision maps and its acquisition and disposal of land be consistent with the open space plan unless the City adopts ordinances to that effect (Gov.Code §§ 65566, 65567, 65700). Even though the City has not adopted the necessary statutes, the City's Planning Department includes these requirements in its publication "A Plan for the Preservation of Natural Parks for San Diego." It appears the City vascillates on this question and thus has the opportunity to deny projects on the basis of inconsistency with the general plan and to deny inverse condemnation because it is not legally bound to have consistency. Although the City weakly protests in its briefs, from the record presented to this court it is clear that even though City may not have been legally bound to have its zoning consistent with its general plan, the City follows this procedure as a matter of policy. The fact that land is within the open space element and its zoning and use are subject to open space constraints, does not constitute inverse condemnation as a matter of law. As noted earlier, the determination there has been inverse condemnation through excessive regulation is a factual matter and we look for substantial evidence to support the finding.

[21, 22] The appellate court presumes the judgment is correct (*Denham v. Superior Court,* 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193) and resolves conflicts in the evidence in support of the judgment (*Nestle v. City of Santa Monica,* 6 Cal.3d 920, 925-926, 101 Cal. Rptr. 568, 496 P.2d 480). Here, the trial court found:

> "Due to the continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has further suffered severance damage

4. Rather, City somewhat inconsistently argues there was no condemnation here because no zoning classification is inconsistent *per se* with open space.

with respect to the balance of the subject property.

"No development could proceed on the property designated as open space unless it was consistent with open space. In light of the particular characteristics of the . . . property, there exists no practical, beneficial or economic use of the . . . property designated as open space which is consistent with open space."

The City has not denied Company a permit to develop the land. Rather Company presented expert witnesses who testified the land could not be used for agriculture because of the soil's high salt content; it could not be used for residences because the land is in a flood plan; it could not be used economically for grazing; it could not be used for a golf course because of poor drainage. In short, the only possible use of the land was for industrial. But, there was testimony by experts that City required zoning to be consistent with the general plan; the City's definitions of open space (see fn. 3) give rise to the inference that industrial use would not be permitted in the open space area; the City's own expert testified he had never seen an industrial development that would be consistent with open space although he did not rule out the possibility entirely.[5] The clear inference is that City would deny any application for industrial development on this parcel because of the open space designation on the general plan. In addition, there was expert testimony that after the open space element was adopted, the land had no economic use and no one would buy it. This was substantial evidence to support the court's conclusion there was inverse condemnation.

[23-25] City claims Company is not entitled to relief because it did not try to get a conditional use permit nor did it establish that City would not grant a rezoning or amend the general plan. Both City and its amicus curiae say this as a failure on Company's part to exhaust its administrative remedies, a necessary prelude for the court to acquire jurisdiction (*Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942). Company here was trying to enjoin City from enforcing the zoning applicable to its property (see *Metcalf v. County of Los Angeles*, 24 Cal.2d 267, 268, 148 P.2d 645; *Banville v. County of Los Angeles*, 180 Cal.App.2d 563, 565, 4 Cal.Rptr. 458); or recover damages in inverse condemnation for a taking of its property. (See *Sneed v. County of Riverside*, 218 Cal.App.2d 205, 212, 32 Cal.Rptr. 318.) As to inverse condemnation we know of no administrative agency that handles such suits; this is a matter for the courts. As to these counts, there was no failure to exhaust any administrative remedy since none existed (see *Ramos v. County of Madera*, 4 Cal.3d 685, 691, 94 Cal.Rptr. 421, 484 P.2d 93). If the ordinance is allegedly

5. City's expert witness testified that a project would not be denied only because it was located within the open space zone and opined that a design for industrial use of the property could be consistent with open space although he concluded "I haven't seen one, but I think that that's possible."

void, then it is necessary to exhaust administrative remedies by seeking a variance or amendment unless it would be futile to do so (*Ogo Associates v. City of Torrance*, 37 Cal.App.3d 830, 834, 112 Cal.Rptr. 761). The trial court said the facts here were within the exception: the land was to be acquired for open space, had been appraised and had been on the ballot for purchase; the site was included as a park in the City's plan for acquiring parks; the land because of its peculiar characteristics is not suitable for any use, and, thus, any zoning other than industrial. It is inconceivable the City would grant an amendment to the general plan when it had always intended this land would be open space, the very reason it was classified as open space. It is irrelevant whether the City would change the zoning to industrial, the only possible use of the land, in light of the substantial evidence City would not permit industrial development here. It would have been futile to seek administrative review and was unnecessary for Company to exhaust its administrative remedies in this regard.

[26, 27] City says if its acts constitute a taking, Company is not entitled to money damages but only to have the offensive regulations set aside. It contends damages are inappropriate because there has been no actual use of the land by the public and, in essence, Company has not sustained any damage.

The proper remedy depends on what acts of the City are challenged and the findings of the trial court. If the City has acted arbitrarily or discriminatorily in passing the ordinance in question, the landowner should use administrative mandate to have the ordinance changed (*HFH, Ltd. v. Superior Court, supra*, 15 Cal.3d 508, 516 fn. 13, 125 Cal.Rptr. 365, 542 P.2d 237); if the City has enacted an unconstitutional or invalid zoning ordinance, the landowner may seek mandate, injunctive relief or declaratory relief (*Pinheiro v. County of Marin, supra*, 60 Cal.App.3d 323, 326, fn. 2, 131 Cal.Rptr. 633) and the governmental agency is immune from any tort liability (Gov.Code § 818.2; *State of California v. Superior Court (Veta)*, 12 Cal.3d 237, 245-247, 115 Cal.Rptr. 497, 524 P.2d 1281); if the zoning is valid but so harsh that it deprives the owner of all beneficial use of its land, there has been a condemnation and damages are proper (see *Eldridge v. City of Palo Alto, supra*, 57 Cal.App.3d 613, 618, 129 Cal.Rptr. 575).

Here Company claimed in one count that the zoning ordinance or the open space element was unconstitutional and void. But it never presented any evidence notice was improper or the ordinance was arbitrary. Rather, the evidence showed and the trial court found that the combination of the zoning on the property plus its inclusion in the open space element plus the City's policy of requiring consistency between zoning and the general plan plus City's overtures to purchase the land for open space had deprived it of the beneficial use of its land. The trial court so found. This is an example of inverse condemnation and the landowner should, under the Constitution, be compensated.

[28] City says that if there was a taking and if compensation is due, the trial court erred in awarding interest from the date of the taking rather than from the date of

judgment. Code of Civil Procedure section 1255b, cited by the City, and in effect at the time suit was commenced,[6] provides in part:

"(a) The compensation and damages awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

"(1) The date of the entry of judgment.

"(2) The date that the possession of the property sought to be condemned is taken or the damage thereto occurs.

"(3) The date after which the plaintiff may take possession of the property as stated in an order authorizing the plaintiff to take possession."

However, former section 1255b deals with eminent domain proceedings and is not applicable here (see *Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal.3d 648, 658, fn. 11, 131 Cal.Rptr. 646, 552 P.2d 430).

[29] City says interest should be paid from the time of judgment because no one has interfered with Company's use of the property nor has there been any actual damage to the property. However, in *Holtz* it was the Transit District's removal of lateral support on adjoining property that caused structural damage to improvements on Holtz's land. The Transit District suggested there should be no prejudgment interest because Holtz was not deprived of the use of his property even though repairs were necessary. The Supreme Court responded:

"The contention that an actual taking or dispossession is required in order to justify prejudgment interest in every case lacks merit. The right to prejudgment interest in inverse condemnation accrues *as of the date the compensable taking or injury occurred without regard to the nature or scope of the compensable event.*" (Emphasis ours; *Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal.3d 648, 657, 131 Cal.Rptr. 646, 653, 552 P.2d 430, 437.)

Here Company's land became the subject of inverse condemnation when the open space element was adopted and, in turn, triggered City's policy of not allowing development of the property. There was no error in awarding prejudgment interest.

[30] City's amicus curiae, the Attorney General, is correct in saying the City's efforts to acquire Company's project by raising the money through a bond issue do not constitute precondemnation blight (see *City of Walnut Creek v. Leadership Housing Systems, supra*, 73 Cal.App.3d 611, 622, 140 Cal.Rptr. 690).

[31] City claims the trial court erred in allowing severance damages because there was no unity of use and no physical contiguity between the condemned and severed portions. Here the condemned parcel was physically separated by a road from other pieces of the Company's land: one was leased by Company and not

6. Section 1255b of the Code of Civil Procedure was repealed effective July 1, 1976 and its provisions are now contained in Code of Civil Procedure section 1268.310. Under Code of Civil Procedure section 1230.065 section 1255b would be used here.

owned in fee and the jury, in a special finding, did not award any damages due to its severance; the other parcel was suitable for industrial development and was zoned just like the piece across the street. However, the fact the two parcels were separated by a road is immaterial as long as there is access between them and the use of the land taken is not dissimilar to that of the remainder (*City of Los Angeles v. Wolfe*, 6 Cal.3d 326, 330, 99 Cal.Rptr. 21, 491 P.2d 813). Here there was testimony the area deemed feasible for industrial development included the remainder parcel. There was no error in awarding severance damages.

[32] City argues the trial court erred when it admitted into evidence how much Company had paid for the land originally. Here there was a bifurcated trial with the court determining liability and the jury damages. In order to establish liability, Company had to show that one of its property rights had been invaded and this had directly caused injury (*Selby Realty Co. v. City of San Buenaventura, supra*, 10 Cal.3d 110, 119-129, 109 Cal.Rptr. 799, 514 P.2d 111). City contends correctly the purchase price of the land is irrelevant because a diminution in the value of the land due to a change in zoning does not result in a taking. However, it is relevant to prove the Company suffered injury. This was not error.

[33] City claims the trial court erred in admitting into evidence the testimony of two expert witnesses, each of whom said he would not have advised Company to apply for an industrial development permit because to do so would have been a waste of time and money. However, this testimony was not admitted for the purpose of showing whether City would approve or deny development; rather it was admitted to explain why Company had not tried to get a permit. This was relevant and its admission was not reversible error.

[34-36] City claims the court erred in compelling City Councilman Floyd Morrow to answer hypothetical questions at an oral deposition. The questions related to Morrow's interpretation as an expert witness of "consistency" with the general plan[7] and potential use of the subject property. City is concerned

7. In substance the three questions were:

i) In your opinion as a land use control expert, may a development plan for the subject property be denied by the City of San Diego on the sole ground that the subject property has been designated as open-space for public acquisition in the open-space element of the City's General Plan?

2) In your opinion, pursuant to Government Code § 65567, may a building permit or subdivision map be properly denied for the sole reason that the use contemplated by the permit or map is not consistent with the open-space element of the General Plan of the City?

3) In your opinion, following the City's adoption of the open-space element of the General Plan in June 1973 were there any practical, beneficial or economic uses to which the subject property could have thereafter been devoted? If so, what?

because Mr. Gallagher, an expert appraiser, relied in part on Morrow's deposition in arriving at his conclusion that the highest and best use of the property was public open space. However, City failed at the trial level to preserve this issue for appeal because it did not object to or move to strike Gallagher's testimony insofar as he relied on Morrow's deposition (see *Bardessono v. Michels,* 3 Cal.3d 780, 794, 91 Cal.Rptr. 760, 478 P.2d 480). Notwithstanding City's failure to object, the questions asked were relevant to a determination of the highest and best use of the property. It is proper to discover an expert's opinion through depositions using hypothetical questions (*Dow Chemical Co. v. Superior Court,* 2 Cal.App.3d 1, 10, 82 Cal.Rptr. 288; *Zelayeta v. Pacific Greyhound Lines,* 104 Cal.App.2d 716, 724, 232 P.2d 572). The questions posed to Morrow asked for his opinion as an expert and did not seek to trace his thought processes or motives in passing some particular piece of legislation; the argument this material was not discoverable because of a legislator's privilege is misplaced (*County of Los Angeles v. Superior Court (Burroughs),* 13 Cal.3d 721, 730-731, 119 Cal.Rptr. 631, 532 P.2d 495). Even if the order compelling answers were improper the resulting prejudice was not sufficient to cause reversible error. The answers in the deposition were only one source of information used by Gallagher in coming to his opinion; he also relied on publications put out by City, opinions of attorneys who were experts in land use matters, his personal experience in appraising other open space property and interviews with potential purchasers and developers. The trial court had the necessary information to be able to assess how much weight to give to Gallagher's testimony.

[37] City complains there is no evidence to support findings 16 and 24 which state:

"16. On April 17, 1973, the City Council of the defendant City adopted a resolution of public convenience and necessity regarding the acquisition of park reserve areas. This resolution did not contain descriptions of specific properties, but referred to a 22.5 million dollar bond issue being proposed for the September, 1973, municipal election. Subsequently, the publicity for this bond issue identified the subject property as one of the properties to be acquired, and newspaper articles appeared prior to the election with maps showing the outlines of the subject property and indicating its acquisition.

"24. Plans were finalized for inclusion of an open space bond issue on the September 18, 1973, municipal election ballot. During the campaign leading up to this election, various presentations and publicity depicted the subject property as property to be acquired for public use by designating it on various graphic representations utilized."

City says the land was only a *proposed* park site which would be purchased only *if* the bond issue passed. However, on appeal the court presumes the judgment is correct and views the evidence in the light most favorable to the prevailing party (*Nestle v. City of Santa Monica, supra,* 6 Cal.3d 920, 925-926, 101

Cal.Rptr. 568, 496 P.2d 480). Here, the City's resolution, adopted April 17, 1973, established the need to acquire park reserve areas "to be subsequently identified" as part of a bond issue on the September 1973 ballot. The property here was later identified as a component part of the park reserve system; the property appeared on a map in the San Diego Union as one which was to be acquired under the park bonding issue; it was designated for purchase in the literature given to voters. This supports the findings made by the trial court.

[38] City says there is no evidence to support findings 29 and 32 which read:

"29. The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has further suffered severance damages with respect to the balance of the subject property.

"32. Following the actions of the defendant City in June of 1973, it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space or the remainder of the subject property."

City argues there is no evidence that City would not allow Company to use the land since Company had not applied for and been denied a permit. However, as outlined earlier, Company presented evidence the property was not good for anything except industrial usage; there was an inference from the City's policy of making zoning consistent with the general plan combined with its definitions of open space and the fact it had decided to acquire properties and made overtures as to this land that City would not permit industrial development here; there was expert testimony there was no practical, beneficial or economic use to which the property could be put; there was testimony the best use of the land was public ownership as open space; there was expert testimony the land was not marketable.

[39] City says only about one-half of Company's property that was condemned was rezoned (see fn. 1). However, it was not the rezoning in itself which resulted in the taking. Rather, Company owns land which because of its peculiar geographic situation and topography has a very limited number of uses. It is the combination of this and other factors, such as zoning, general plan, the "consistency" policy, and the resolution to acquire property which led to the condemnation.

[40] City says Company's witnesses testified only as to the economic feasibility of developing the property; this City claims is merely another version of the diminution of value rule and is not a sufficient basis for inverse condemnation (*Pinheiro v. County of Marin, supra,* 60 Cal.App.3d 323, 325, 131 Cal.Rptr. 633). The question asked is whether government regulation has deprived the owner of the beneficial use of its land. Here there was evidence Company could

not develop this land in any way. This is more than just decreasing the value of the land; it is destroying it completely.

[41] City says Company's witnesses contradict themselves when they say it would be futile to seek building approval from the City because none of the experts had that many personal experiences in trying to get permits. However, this goes to the weight of the evidence, a determination made by the fact-finder.

[42] City argues there is no evidence to support finding of fact number 31 which reads:

"31. Since June 19, 1973, the property designated as open space has been devoted to use by the public as open space."

There is no evidence of actual physical invasion of the property. However, this is exactly what the City is trying to do by acquiring the property, that is, keep it from being used. The Attorney General in its brief argues for extensive protection of the sensitive estuarine ecosystem from the harmful effects of intrusion. The objective here is to have the property remain unused, undisturbed and in its natural state so open space and scenic vistas may be preserved. In this sense the property is being "used" by the public as it has been ever since the date when all the factors coalesced to effect the taking. In addition, there was expert testimony the property had been given over to public use. This was substantial evidence to support the finding.

[43] City challenges the support for and validity of Conclusion of Law #1 which states:

"1. The actions of defendant City against plaintiff's property were motivated to achieve a public purpose, namely, preservation of open space, without payment of just compensation and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just compensation within the meaning of the California and United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property."

City says there was no evidence here that its acts were not a legitimate exercise of the police power. Whether what may have begun as a legitimate use of the police power became so unreasonable as to be a taking is a question of fact. As noted earlier there was evidence to support a finding that Company had been deprived of all beneficial use of its land. There was evidence one city councilman had stated the city should preserve as much open space as possible through regulatory measures such as agricultural flood plain zoning to reduce acquisition costs; the City Attorney and the Planning Commission were told to prepare a list of open space areas where the City could proceed with agricultural, flood plain and/or LC (limited control) zoning; the open space maps were changed to include more of Company's land without actual notice to the Company; the City reaffirmed some zoning as industrial and changed some to

future industrial and then two weeks later placed the land in open space. This is substantial evidence to support the trial court's conclusion.

The judgment is affirmed.

COLOGNE and STANIFORTH, JJ., concur.

Rehearing denied; STANIFORTH, J., dissenting.

APPENDIX C

Denial of Petition for Rehearing by the California Court of Appeal, Fourth Appellate District. Division One, dated June 13, 1978

C-1

COURT OF APPEAL - FOURTH DIST.
FILED
JUN 13 1978
ERVIN J. TUSZYNSKI, Clerk
W. Delton
DEPUTY CLERK

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN DIEGO GAS & ELECTRIC COMPANY, Plaintiff and Respondent, v. CITY OF SAN DIEGO, et al., Defendants and Appellants.	4 Civ. No. 16277 (Superior Court No. 357022)

Upon petition for rehearing, the opinion filed May 17, 1978 is modified to read in its entirety as follows:

[See Appendix B for full text]

The petition for rehearing is denied.

Staniforth, J., would grant a rehearing.

Brown
Presiding Justice

APPENDIX D

Notice of Hearing Granted by the California Supreme Court, dated July 13, 1978

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 13 1978

I have this day filed Order

HEARING GRANTED

L.A. 30386

In re: 4 Civ. *No.* 16277

San Diego Gas & Electric Co.

vs.

City of San Diego, etc. et al.

Respectfully,

G. E. BISHEL
Clerk

83322-877 10-77 3M OSP

APPENDIX E

Retransfer Order of the California Supreme Court, dated June 14, 1979

E-1

L. A. No. 30985

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SAN DIEGO GAS AND ELECTRIC COMPANY

v.

CITY OF SAN DIEGO ET AL.

The above-entitled cause is retransferred to the Court of Appeal, Fourth District, Division One, for reconsideration in light of Agins v. City of Tiburon, (1979) 23 Cal. 3d 605.

SUPREME COURT
FILED
JUN 14 1979
G. E. BISHEL, Clerk

Bird

Chief Justice

APPENDIX F

Agins v. City of Tiburon 24 Cal.3d 266 (1979)

AGINS *v.* CITY OF TIBURON
24 Cal.3d 266;

[S.F. No. 23866. Mar. 14, 1979.]

[As modified May 17, 1979.]

DONALD W. AGINS et al., Plaintiffs and Appellants, v. CITY OF TIBURON et al., Defendants and Respondents.

SUMMARY

The city in which plaintiffs owned five acres of unimproved land passed a zoning ordinance designating plaintiffs' property as a "residential planned development and open space zone." As applied to plaintiffs' five acres, the zoning meant a maximum of five one-family dwellings or a minimum of one. Plaintiffs never applied to use or improve their property following adoption of the zoning ordinance, nor did they seek or receive any definitive statement as to how many dwelling units they could build on their land. Plaintiffs filed a claim against the city in the amount of $2 million, alleging that the adoption of the ordinance completely destroyed the value of their property. The city rejected the claim, and plaintiffs filed a complaint alleging, as a first cause of action, a claim in inverse condemnation, and requesting in a second cause of action declaratory relief, asserting the ordinance was unconstitutional in that it constituted a taking of plaintiffs' property without payment of just compensation. Defendants' general demurrer to the inverse condemnation cause of action was sustained without leave to amend, while the demurrer to the declaratory relief cause of action was sustained with leave to amend. Plaintiffs declined to amend and the trial court entered a judgment of dismissal with prejudice. (Superior Court of Marin County, No. 75873, Jack L. Blaine, Temporary Judge.*)

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*Pursuant to Constitution, article VI, section 21.

The Supreme Court affirmed. The court held that, while a landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of U.S. Const., Fifth Amend., and Cal. Const., art. I, § 19, he may not elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid. The court further held that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property. Accordingly, since the ordinance allowed plaintiffs to build between one and five residences on their property, the court held the trial court acted properly in determining that plaintiffs were not, as a matter of law, entitled to a favorable judgment in declaratory relief. The court rejected plaintiffs' argument that the city's "precondemnation activities" (the authorization of studies recommending acquisition of plaintiffs' land for open space and bonds for its purchase, and the filing and subsequent abandonment of an eminent domain proceeding), were so unreasonable as to provide a separate basis for an action for inverse condemnation. (Opinion by Richardson, J., with Bird, C. J., and Tobriner, Mosk, Manuel, and Newman, JJ., concurring. Separate dissenting opinion by Clark, J.)

OPINION

RICHARDSON, J.—We review the availability of inverse condemnation as a landowner's remedy when a public agency has adopted a zoning ordinance which substantially limits use of his property. We will conclude that although a landowner so aggrieved may challenge both the constitutionality of the ordinance and the manner in which it

is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, he may not recover damages on the theory of inverse condemnation.

Plaintiffs own five acres of unimproved land in the City of Tiburon, Marin County. Tiburon has an area of 1,676 acres, a population of approximately 6,000, and because of its proximity to San Francisco, its aquatic facilities, temperate climate, and other geographic advantages, is a very desirable suburban residential area. Plaintiffs' real property is ridgeland, possesses views of San Francisco Bay, and was acquired by plaintiffs for residential development.

Tiburon, like every other city in California, is required by state law to prepare a general plan containing, among other things, "A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space . . . and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan." (Gov. Code, § 65302, subd. (a).)

Routinely, the development of a general plan entails a careful examination of numerous social and economic factors. Many cites, especially those which are too small to maintain a staff of sufficient size and technical expertise to undertake such a project, seek the advice of expert consultants. The recommendations of these consultants are considered when the local governmental entity prepares its general plan.

In January 1972 Tiburon retained two private consultants, Williams & Mocine and Dean Witter & Co., Incorporated, to prepare advisory

reports. The Williams report, issued in October 1972, focused on possible land use designations and recommended that Tiburon attempt to acquire "a substantial portion of Tiburon ridge" for "open space." Plaintiffs' property was identified in the report as one of those parcels of property which were suitable for acquisition for open space. The Witter report, dated July 1972, recommended that the purchase of open space lands be financed through the issuance of $1.25 million of general obligation bonds. The subsequent resolution of the Tiburon City Council approving sale of these bonds did not specifically authorize acquisition of plaintiffs' property or directly refer to it.

By Ordinance No. 124 N.S., effective June 28, 1973, Tiburon adopted widespread zoning modifications which drew upon but did not mirror the consultants' reports. Under the ordinance, plaintiffs' land was designated "RPD-1," defined by Ordinance No. 123 N.S. as a "Residential Planned Development and Open Space Zone." The authorized uses of land so designated are (1) *one-family dwellings*, (2) open space uses, and (3) accessory buildings and accessory uses. The permissible density of buildings is "not less than .2 nor more than 1 dwelling unit per gross acre" depending on other specified provisions. As applied to plaintiffs' five acres "RPD-1" zoning means a maximum of five dwelling units or a minimum of one. Whether plaintiffs are permitted to build five dwelling units, or fewer, will depend upon the particular architectural design contemplated and the results of the required environmental impact report.

Plaintiffs have never made application to use or improve their property following Tiburon's adoption of Ordinance No. 124 N.S., nor have they either sought or received any definitive statement as to how many dwelling units they could build on their land. On October 15, 1973, plaintiffs filed a claim against the City of Tiburon in the amount of $2 million alleging that the adoption of Ordinance No. 124 N.S. had completely destroyed the value of their property. The city rejected the claim on November 12, 1973.

On December 4, 1973, Tiburon filed a complaint in eminent domain against plaintiffs to acquire their property, but on November 1, 1974, filed a notice of abandonment of the proceedings as then authorized by Code of Civil Procedure section 1255a, subdivision (a). (This section was repealed by Stats. 1975, ch. 1275, § 1.) The trial court entered its judgment of dismissal of the action on May 20, 1975. The city paid plaintiffs $4,500 for their necessary expenses incurred during the pendency of the action pursuant to section 1255a, subdivision (c), which then fixed the rights of a condemnee upon abandonment of a condemnation proceeding. The remedy was exclusive and the section did not include, as an element of damages, financial impairment during pendency of the eminent domain action of the owner's right to sell. Accordingly, there was no further cause of action available to plaintiffs by reason of the city's eminent domain proceeding.

On June 16, 1975, plaintiffs filed their complaint in the Marin County Superior Court against the City of Tiburon and Does One through Fifty alleging, as a first cause of action, a claim in inverse condemnation for $2 million damages and requesting, in a second cause of action, declaratory relief, asserting, among other things, that Ordinance No. 124 N.S. is unconstitutional in that it "constitutes a taking of [plaintiffs'] property without payment of just compensation."

Defendants' general demurrer to the first cause of action (inverse condemnation) was sustained without leave to amend. Similarly, their demurrer to the second cause of action (declaratory relief) was sustained with 10 days leave to amend. Plaintiffs declined to amend their second cause of action and plaintiffs appeal from the ensuing judgment of dismissal with prejudice.

(1a) Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional "taking of

[plaintiffs'] property without payment of just compensation" for which an action in inverse condemnation will lie. Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing the preferable view to be that, while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available. This conclusion is supported by a leading authority (1 Nichols, Eminent Domain (3d rev. ed. 1978) Nature and Origin of Power, § 1.42(1), pp. 1-116 through 1-121), who expresses his view in this manner: "Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. *Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation.*" (Italics added.)

We have previously pointed to the general nature of the appropriate remedy in such cases. In *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237 [115 Cal.Rptr. 497, 524 P.2d 1281], real parties had been granted a permit to develop their coastal lands by a regional commission. They brought suit when a permit was denied following an appeal to the California Coastal Zone Commission. We held that declaratory relief was an appropriate remedy by which to seek a declaration that a statute controlling development of coastal lands was facially unconstitutional. Further, insofar as the challenge was to the constitutionality of the act's *application* to the lands of the complaining parties, we concluded that the proper and sole remedy was administrative mandamus.

Similarly, a landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment to the United States Constitution and article I, section 19, of the California Constitution. He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid. (See *Friedman* v. *City of Fairfax* (1978) 81 Cal.App.3d 667, 678 [146 Cal.Rptr. 687].) To the extent that *Eldridge* v. *City of Palo Alto* (1976) 57 Cal.App.3d 613 [129 Cal.Rptr. 575], is contrary, it is expressly disapproved.

(2a) There is a clear, direct and unquestionable constitutional basis for the protection of private property. Amendment V of the United States Constitution provides that "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." In concert with the foregoing Fifth Amendment language article I, section 19, of the California Constitution mandates that "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has been paid to, or into court for, the owner."

(3) "Property," in a legal sense, has been broadly defined. The United States Supreme Court has said that the term "property" is not used in "the vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. . . . [Instead it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." (*U.S.* v. *General Motors Corp.* (1945) 323 U.S. 373, 377-378 [89 L.Ed. 311, 318, 65 S.Ct. 357, 156 A.L.R. 390].)

(2b) While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights. Such Fifth Amendment property rights have been equated by the constitutional draftsmen with the cherished personal protections against self-incrimination, double jeopardy, and the guarantee of due process of law. These rights are protected by the same amendment.

In balancing the constitutional rights of the landowner against the legitimate needs of government we do not ignore well established precedent. In *Pennsylvania Coal Co.* v. *Mahon* (1922) 260 U.S. 393 [67 L.Ed. 322, 43 S.Ct. 158, 28 A.L.R. 1321], an injunction was sought to prevent a coal company from causing subsidence of property due to the company's underground mining activities. This Supreme Court opinion has generated some confusion and has even been cited erroneously for the proposition that inverse condemnation is readily available as a remedy in zoning cases because of Justice Holmes' statement that "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (*Mahon, supra,* at p. 415 [67 L.Ed. at p. 326].) It is clear both from context and from the disposition in *Mahon*, however, that the term "taking" was used solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain. The high court set aside the injunctive relief which had been granted by the Pennsylvania courts and declared void the exercise of police power which had limited the company's right to mine its land. The court did not attempt, however, to transmute the illegal governmental infringement into an exercise of eminent domain and the possibility of compensation was not even considered.

In *HFH, Ltd.* v. *Superior Court* (1975) 15 Cal.3d 508 [125 Cal.Rptr. 365, 542 P.2d 237], we examined directly the problem of available remedies for aggrieved landowners and held that inverse condemnation does not lie in zoning actions in which the complaint alleges the mere reduction of market value, and that a zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging of property. In *HFH, Ltd.* we specifically noted that "This case does not present, and we therefore do not decide, the question of entitlement to compensation in the event a zoning regulation forbade substantially *all* use of the land in question. We leave the question for another day." (P. 518, fn. 16, italics in original.) We now reach that issue.

While it is true that the land uses which were regulated in *HFH, Ltd.* were commercial, we find no reason to distinguish it on that basis from similar situations in which the regulation affects land used for residential, recreational, or other purposes, or to extend the additional relief of inverse condemnation to the owners of noncommercial property. (For a discussion of a contrary analysis which recommends the extension of a damages remedy in a noncommercial context, see Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis* (1977) 86 Yale L.J. 385, 507-511.)

We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged. The expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to preserve our natural resources, including the land around us, has resulted in changing attitudes toward the regulation of land use. Recognition of this historic trend is not new. The United States Supreme Court perceptively observed more than 50 years ago that with the passage of time and increased concentration of

people "problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day. . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." (*Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 386-387 [71 L.Ed. 303, 310, 47 S.Ct. 114, 54 A.L.R. 1016].)

In the half century since *Euclid* the foregoing abstract principles under the force of experience have coalesced into a specific functional requirement. Community planners must be permitted the flexibility which their work requires. As we ourselves have recently observed, "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 120 [109 Cal.Rptr. 799, 514 P.2d 111].)

Other commentators have recognized that the utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. "This threat of unanticipated financial liability

will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe." (Hall, *Eldridge* v. *City of Palo Alto: Aberration or New Direction in Land Use Law?* (1977) 28 Hastings L.J. 1569, 1597.)

We envisage that the availability of an inverse condemnation remedy in these situations would pose yet another threat to legislative control over appropriate land-use determinations. It has been noted that "The weighing of costs and benefits is essentially a legislative process. In enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required to achieve the objectives of that ordinance. Determining that a particular land-use control requires compensation is an appropriate function of the judiciary, whose function includes protection of individuals against excesses of government. But it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses." (Fulham & Scharf, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance* (1974) 26 Stan.L.Rev. 1439, 1450-1451; see also Bowden, *Legal Battles on the California Coast: A Review of the Rules* (1974) 2 Coastal Zone Management J. 273.)

Other budgetary consequences reveal themselves when the land use control is exercised by means of the initiative. "Legislation in the nature of zoning can be and has been enacted by the people through a direct initiative. Are the voters, through the initiative power, also to have this unwelcome power to *inadvertently* commit funds from the public treasury? The logical extension of requiring compensation for the mere enactment of a harsh zoning measure indicates that the answer would be in the affirmative. The potential for fiscal chaos would be great if this were the result." (28 Hastings L.J., *supra*, at p. 1598, italics in original.)

(1b) In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances.

(4a) Having clarified the nature of the remedies available to an aggrieved landowner, we now consider whether the property owners before us established their right to declaratory relief. We conclude that they did not.

(5) An ordinance which on its face results in a mere diminution in the value of property is not per se improper. In *HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, we examined a change in zoning which reduced the value of property from $400,000 to $75,000. We concluded that no remedy was available for a mere decrease in the value of property. By this holding we acknowledged a practical truism which had been expressed by Justice Holmes more than 50 years ago in the *Mahon* cases: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." (*Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. at p. 413 [67 L.Ed. at p. 325].)

(4b) Accepting as we must the general proposition that whether a regulation is excessive in any particular situation involves questions of degree, turning on the individual facts of each case, we hold that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property. The ordinance before us had no such effect. According to the wording of the ordinance, of which we may take note, the RPD-1 zoning allows plaintiffs to build between one

and five residences on their property. This belies plaintiffs' claim that development of their land is forever prevented. Taking cognizance of the use which plaintiffs were entitled to make of their land the trial court was justified in finding that the ordinance did not unconstitutionally interfere with plaintiffs' entire use of the land or impermissibly decrease its value. The trial court acted properly in determining that plaintiffs were not, as a matter of law, entitled to a favorable judgment in declaratory relief.

(6) Plaintiffs also argue that the city's "precondemnation activities," those being the authorization of studies which recommended acquisition of plaintiffs' land for open space and bonds for its purchase, and the filing and subsequent abandonment of an eminent domain proceeding, were so unreasonable as to provide a separate basis for an action for inverse condemnation. Plaintiffs err and we do not find persuasive their reliance on *Klopping v. City of Whittier* (1972) 8 Cal.3d 39 [104 Cal.Rptr. 1, 500 P.2d 1345], for support for their contention.

Klopping involved a plaintiff's recovery for the decline in market value as the result of an unreasonable delay in the institution of eminent domain proceedings following announcement of intent to condemn, and other unreasonable conduct prior to condemnation. In the matter before us there was no such delay or conduct. Tiburon instituted eminent domain proceedings less than six months after Ordinance No. 124 N.S. was adopted. It is manifest that general land-use planning discussions and related decision-making by elected officials must be both unhampered and public. Together or singly, neither process constitutes a "taking" of the property under consideration. Any other conclusion would violate sound public policy.

Our appellate courts have recognized the appropriate controlling principles. "*Selby* [*supra,* 10 Cal.3d 110] made clear that *Klopping* [*supra,* 8 Cal.3d 39] was no support for a claim that planning designations constitute takings." (*Navajo Terminals, Inc.* v. *San Francisco Bay Conservation etc. Com.* (1975) 46 Cal.App.3d 1, 4 [120 Cal.Rptr. 108].) As was noted in *City of Walnut Creek* v. *Leadership Housing Systems* (1977) 73 Cal.App.3d 611 [140 Cal.Rptr. 690], ". . . the inclusion of the property for public use in a general plan does not give rise to a cause of action. If calling a bond election and urging passage to secure funds for a public purpose constituted a taking, the agency so acting would be subject to suit whether or not the issue carried. The expression of political preference cannot be so burdened." (Pp. 622-623.)

Recognizing the constitutionally protected property interests here involved, we also accept the reasonable latitude which must be afforded public officials in the planning for an implementation of legitimate land use goals. These twin purposes will be served by preserving for the landowner, in appropriate cases, declaratory relief or mandamus remedies. However, the use of inverse condemnation with its imposition of money damages upon the public entity would, in our view, unwisely inhibit the proper and necessary exercise of a valid police power.

The judgment is affirmed.

Bird, C.J., Tobriner, J., Mosk, J., Manuel, J., and Newman, J., concurred.

CLARK, J., Dissenting.—"Private property may be taken *or damaged* for public use *only* when just compensation . . . has first been paid to . . . the owner." (Cal. Const., art. I, § 19; italics added.) "Damage," as used in the constitutional provision, has always included

diminution in intrinsic value even when falling short of actual taking, spoilation or invasion. (*Reardon* v. *San Francisco* (1885) 66 Cal. 492 [6 P. 317].)

It must be clear to all of us that, as alleged by plaintiffs, the City of Tiburon has decided through the political process that in order to preserve its way of life and to maintain what is already among the highest residential land values in the state,[1] certain of its property owners must sacrifice use of their lands. Such lands—including plaintiffs'—are thus alleged to have been damaged in order to preserve or enhance the value of undisturbed land. This is the clearest of examples wherein our system functions "'to sacrifice the individual to the community, and it seems very difficult in reason to show why the [City of Tiburon] should not pay for property which it destroys or impairs the value . . . .'" (*Bacich* v. *Board of Control* (1943) 23 Cal.2d 343, 351 [144 P.2d 818].)

Recognizing the policy considerations in resolving the question when a "taking" must be paid for by government and when it may be deemed merely a permissible intrusion incident to governmental function, the United States Supreme Court has stated that a factual consideration "is the extent of the diminution [of property value]. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." (*Pennsylvania Coal Co.* v. *Mahon* (1922) 260 U.S. 393, 413 [67 L.Ed. 322, 325, 43 S.Ct. 158, 28 A.L.R. 1321].) What greater diminution can there be than where—as here—plaintiffs have alleged and the City of Tiburon has admitted that the ordinance complained of "has completely destroyed the value of Plaintiffs' property for any purpose or use whatsoever . . ."? We have said that the "underlying

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[1]It is alleged by plaintiffs' complaint and admitted by the city's demurrer that the City of Tiburon has "the highest land value per acre for suburban areas in the State of California."

purpose of our constitutional provision in inverse—as well as ordinary—condemnation is 'to distribute through the community the loss inflicted upon the individual by the making of public improvements' [citation]; 'to socialize the burden . . . —to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society' [citation]." (*Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303 [90 Cal.Rptr. 345, 475 P.2d 441].) If those words have any meaning at all this must be the case where they are applicable—unless, of course, the majority deem they are not bound by the honored rule of law which prevents the court on a demurrer from finding factual matters contrary to matters well pleaded in the complaint.[2] (See, *Serrano* v. *Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241].)

The majority opinion attempts to justify its judgment on the ground that plaintiffs—if they are entitled to relief at all—must look to some remedy other than inverse condemnation. (*Ante,* p. ___.) While purporting to recognize that the Fifth Amendment mandates "private property shall not be taken for public use, without just compensation," that the "'constitutional provision is addressed to every sort of interest the citizen may possess'" (*ante,* p. ___), and that "we cannot countenance the service of [the need of government to improve the quality of life] through the uncompensated destruction of private property rights" (*id.*), the majority refuse to follow these precepts. Their refusal is grounded on their mistaken analysis of this court's earlier decision in *HFH, Ltd.* v. *Superior Court* (1975) 15 Cal.3d 508 [125 Cal.Rptr. 365, 542 P.2d 237].

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[2]Conclusionary allegations of damage to property are insufficient to support—against a demurrer—a complaint in inverse condemnation. (See, *Hecton* v. *People ex rel. Dept. of Transportation* (1976) 58 Cal.App.3d 653 [130 Cal.Rptr. 230].) Additionally, the particular facts of the case must be set out in the complaint. (*Id.*, at p. 657.) Plaintiffs have alleged with factual particularity the significant activities taking place prior to and constituting the inverse condemnation. They also allege the lack of remaining reasonable beneficial use resulting from these activities. (Cf. *Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 328 [131 Cal.Rptr. 633].)

In *HFH* the majority held that inverse condemnation does not lie in a downzoning action when the complaint alleges mere reduction in market value. That case expressly stands for the proposition that a zoning ordinance which "merely decreased the market value of property" does not necessarily violate constitutional provisions "forbidding uncompensated taking or damaging" of property. (*HFH, Ltd.* v. *Superior Court, supra,* 15 Cal.3d 508, 518.) If, as the majority held in *HFH,* the difference between "merely decreasing" a property value on the one hand and "taking" a property interest on the other is one of degree, the majority today—in view of the admitted allegation that the ordinance "has completely destroyed the value of plaintiffs' property for any purpose or use whatsoever"—obliterate that distinction. Under today's holding inverse condemnation is no longer an available remedy—perhaps short of government actually dispossessing an owner—whatever the harshness of a zoning regulation. The distinction which the majority purport to carefully draw in *HFH* has been rejected and that case provides no support for today's decision.

Until today, this court has adhered to its rule that a harsh zoning regulation gives rise to inverse condemnation. (See *Klopping* v. *City of Whittier* (1972) 8 Cal.3d 39, 46 [104 Cal.Rptr. 1, 500 P.2d 1345].) The rule, moreover, is compelled by the Legislature: "The Legislature hereby . . . declares that this article [Open-Space Zoning] is not intended and shall not be construed, as authorizing the city . . . to exercise its power to adopt . . . an open-space zoning ordinance in a manner which will . . . damage private property for public use without the payment of just compensation therefor." (Gov. Code, § 65912; see also, Gov. Code, § 51073.) However, the majority reject the established rule and legislative direction in disapproving the recent case of *Eldridge* v. *City of Palo Alto* (1976) 57 Cal.App.3d 613 [129 Cal.Rptr. 575] (petn. for hg. den. July 15, 1976). That case involves a particularly harsh zoning ordinance. The court concluded, after a

detailed review of pertinent decisions, "that a valid zoning ordinance may nevertheless operate so oppressively as to amount to a taking, thus giving an aggrieved landowner a right to damages in inverse condemnation." (*Id.*, at p. 621.) The "leading authority" relied on by the majority (*ante*, p. ____) is in agreement with *Eldridge*. (See, 1 Nichols on Eminent Domain (3d rev. ed. 1978) Nature and Origin of Power, § 1.42(1), pp. 1-116 through 1-121; 2 Nichols on Eminent Domain (3d rev. ed. 1978) Taking and Damage, § 6.3, p. 6-65.)

When a zoning restriction is so harsh as to transcend a constitutionally protected property right is a question of fact to be determined by trial rather than by demurrer. (See *Wilkins* v. *City of San Bernardino* (1946) 29 Cal.2d 332, 338-339 [175 P.2d 542]; *Eldridge* v. *City of Palo Alto, supra*, 57 Cal.App.3d 613, 628.) Plaintiffs have well pleaded a cause of action in inverse condemnation, and should be afforded an opportunity to prove their allegations.

Today's real issue is the extent to which a court will permit—even encourage—governmental agency intrusion into a constitutionally protected area. The majority argue we must condone greater intrusion; that we must recognize "changing attitudes toward the regulation of land use" (*ante*, p. ____); that community planners must be permitted the flexibility which their work requires (*ante*, p. ____); that the use of inverse condemnation "will have a chilling effect upon the exercise of police regulatory powers at a local level" and "'will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe'" (*id.*); and that enactment of a zoning

ordinance being essentially legislative process, courts should cease affording a legal remedy in inverse condemnation.[3]

Today's decision effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation. While the majority of this court can finally declare that such a taking does not offend local constitutional prohibitions, their judgment does not foreclose federal constitutional examination. It is clear that compelling federal authority requires compensation for the taking alleged by plaintiffs in this case. The United States Supreme Court will hopefully adhere to Justice Holmes' admonition that "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. 393, 416 [67 L.Ed. 322, 326]; see also *Goldblatt* v. *Hempstead* (1962) 369 U.S. 590, 594 [8 L.Ed.2d 130, 134, 82 S.Ct. 987]; *Armstrong* v. *United States* (1960) 364 U.S. 40, 49 [4 L.Ed.2d 1554, 1561, 80 S.Ct. 1563]; *U.S.* v. *Central Eureka Mining Co.* (1958) 357 U.S. 155, 168 [2 L.Ed.2d 1228, 1236, 78

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[3]The majority's holding unnecessarily goes far beyond a mere determination that—in the majority's view—plaintiffs in this case are entitled to no relief. In the concluding portions of the majority opinion it is stated—although as earlier noted contrary to established rules on review of judgments following sustaining of demurrer—that the Tiburon ordinance does not deprive plaintiffs of "substantially all reasonable use" of their property (*Ante,* p. ___) Thus *HFH, Ltd.* v. *Superior Court, supra,* 15 Cal.3d 508, requires rejection of plaintiffs' claim because there has been a "mere diminution" of value as opposed to a taking of property, according to the majority. The majority's further assertion that inverse condemnation is no longer available to compensate an aggrieved landowner, appears to be—after more than a century of settled law to the contrary—obiter dicta. Such far-reaching pronouncement would be better left to another day and case wherein the issue is squarely presented and the parties have full opportunity to address it.

S.Ct. 1097]; *Berman* v. *Parker* (1954) 348 U.S. 26, 36 [99 L.Ed. 27, 39, 75 S.Ct. 98]; *U.S.* v. *Willow River Co.* (1945) 324 U.S. 499, 502 [89 L.Ed. 1101, 1107, 65 S.Ct. 761]; *Block* v. *Hirsch* (1921) 256 U.S. 135 [65 L.Ed. 865, 41 S.Ct. 458, 16 A.L.R. 165].) Lower federal court decisions are universally contrary to the majority opinion in this case. When the Richmond Redevelopment Agency urged that because it exercised police powers it did not have to pay just compensation to a landowner, the Ninth Circut [*sic*] held: "It is clear . . . that a governmental agency acting pursuant to the State's police power must pay just compensation for any taking it effects." (*Richmond Elks Hall Assn.* v. *Richmond Redevelopment* (9th Cir. 1977) 561 F.2d 1327, 1332; see also *Beneson* v. *United States* (Ct. Cl. 1977) 548 F.2d 939, 947; *Drakes Bay Land Company* v. *United States* (Ct.Cl. 1970) 424 F.2d 574, 584; *Dahl* v. *City of Palo Alto* (N.D.Cal. 1974) 372 F.Supp. 647, 648-649.)

The Supreme Court's latest expression of continuing adherence to the mandate of the Fifth and Fourteenth Amendments is contained in *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency* (1979) ___ U.S. ___ [59 L.Ed.2d 401, 99 S.Ct. ___]. In that case lands originally zoned as residential and commercial were rezoned by an interstate agency to allow limited residential use subordinated to public recreational use. Property owners claimed that the land use ordinance constituted inverse condemnation. The district court held that a cause of action for inverse condemenation [*sic*] was sufficiently alleged but that the action could not be maintained against the interstate agency, and that individual members of the agency were immune from suit. The court of appeals held that the interstate agency was federal in character, that the agency was therefore immune under the Eleventh Amendment, and that individual members of the agency were also immune. The Supreme Court answered by holding a cause of action was properly alleged, and that the interstate agency was neither federal in character nor immune, although individual agency

members were immune. While the court was primarily concerned with immunity issues, the sense of the holding is that an action in inverse condemnation lies for a taking brought about by land use regulation of the very nature involved in the instant case.

Particular areas of concern must be seen arising from today's decision. First, the majority's solution is really a nonremedy for an aggrieved landowner. If he can protect his lands only through a proceeding to declare the invalidity of a land use regulation, he must lose interim use of his land—most likely for a period of years—suffering substantial legal costs, even though he may ultimately prevail. Moreover, there is nothing to prevent the governmental agency from reenacting a modified ordinance compelling a second or even third proceeding—a burden exceeding bare possibility in view of the majority's invitation to oppressive land use limitation. Many landowners—particularly small ones—will be economically unable to challenge even a confiscatory enactment, being compelled to walk away from their properties.

Perhaps of greater concern is the consequence that Tiburon—and many other govenmental [*sic*] agencies enacting similar land use plans—will price properties within their control out of reach of most people. Only the most wealthy will be able to afford purchase of and construction on lands in such areas. The environment which Tiburon seeks to preserve will disproportionately benefit that wealthy landowner, whose home will be surrounded by open space, unobstructed view and unpolluted atmosphere.

I reject the majority rationalization. It abdicates our responsibility to give meaning and substance to constitutional mandate.

Today's decision must further encourage city councils and their zoners to politically preserve entrenched property use. The decision

not only shuts Mr. Agins out from our courtroom, but also his successor-owners from sharing a nice but exclusive environment.

The judgment of dismissal should be reversed.

APPENDIX G

Unpublished Opinion of the California Court of Appeal, Fourth Appellate District, Division One, dated June 26, 1979

COURT OF APPEAL - FOURTH DIST.
FILED
JUN 26 1979
ROBERT L. FORD, Clerk
DEPUTY CLERK

G-1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN DIEGO GAS & ELECTRIC COMPANY, Plaintiff and Respondent, v. CITY OF SAN DIEGO, et al., Defendants and Appellants.	4 Civ. No. 16277 (Superior Court No. 357022)

APPEAL from a judgment of the Superior Court of San Diego County. Jack R. Levitt, Judge. Reversed.

The City of San Diego (City) appeals the judgment after the court found it had inversely condemned property owned by San Diego Gas & Electric Company (Company) which the jury valued at $2,886,300. Additionally, the jury found $283,696 severance damages. The court ordered interest of 7% to be paid on the total, $3,169,996, from the date of taking, June 19, 1973, plus appraisal, engineering and attorneys' fees totaling $122,559.07. After our original affirmance, the California Supreme Court granted a petition for hearing. The case has now been retransferred to us for reconsideration in light of *Agins v. City of Tiburon*, 23 Cal.3d 605.

The property is in Sorrento Valley in the northern part of the City, in the southwest quadrant of the intersection of Highway I-5 and Carmel Valley Road between I-5 and the Torrey Pines State Park; it is generally at low elevation, is a drainage basin, tidal basin or flood plain and is subject to standing water or "ponding"; part is subject to ocean tidal action and portions have been referred to as the Los Penasquitos Lagoon, an estuary and wildlife refuge; a portion is within the State Coastal Act zone.

Company assembled the approximately 412-acre parcel in 1966 and then discussed with City its plan to hold part of the land for possible future construction of a power plant. In 1972 City initiated rezoning hearings for the property which was then zoned industrial (M-1A zone) and agricultural or holding zone (A-1-1); at that time the City General Plan Map designated most of the property as industrial and the remainder as "area for future growth." At the same time, the City Planning Department was preparing an open space plan for the city which ultimately was entitled "A Plan for the Preservation of Natural Parks for San Diego" and included about 230 acres of Company's land. In addition, in early 1973, the Community Development Department prepared a staff report entitled "Park Reserve Systems," which discussed the financing and acquisition of park reserve lands and got estimated values for the proposed park properties, including the property in question here, as part of a bond proposal to be put before the electorate in September 1973.

The City Council, on June 7, 1973, downzoned some of the land from industrial to A-1-10 and part of the A-1-1 land was designated for future industrial development; the rest of the land in the industrial zone

retained its industrial classification.[1] On June 19, 1973, City adopted the open space element of the general plan which covered all of the land found condemned here, about 233 acres. In September 1973 the report of the Community Development Department was received and this property appeared on maps as one of the properties to be acquired if the bond issue passed. It failed. A year later Company filed suit.

The City claims its acts in zoning the property for light industry and agriculture with an open space general plan designation do not constitute a taking or a damaging of property. Company claims City has inversely condemned its land because the zoning regulations combined with the open space element of the general plan has made the property useless.

The power of eminent domain is the state's inherent power to take private property for public use (*Rose v. State of California,* 19 Cal.2d 713, 719). However, the state is limited in exercising this power by Article I, section 19 of the California Constitution which assures the private landowner he will be compensated if his land is taken or damaged.

The state derives its authority to zone property from the police power, the government's power to enact regulations to protect the health, safety and welfare of its citizens. Unlike the person whose

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FOOTNOTE 1: From 1966-1973 the property was zoned:

Industrial (M-1A)	116 acres
Agricultural (A-1-1)	112 acres
Agricultural holding zone	

After the rezoning the land was classed as:

Industrial (M-1A)	77 acres
Agricultural (A-1-10)	39 acres
Agriculatural [*sic*] holding zone (A-1-1) with 50 acres to be considered for future industrial use.	112 acres

property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation (*Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515, 530). In California the general rule is that a rezoning which reduces the market value of the land does not give rise to a cause of action in inverse condemnation (*HFH, Ltd, v. Superior Court,* 15 Cal.3d 508, 514). A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus (*Agins v. City of Tiburon, supra,* 23 Cal.3d 605, 611).

Company complains it has been denied all use of its land which is zoned for agriculture and manufacturing but lies within the open space area of the general plan. It has not made application to use or improve the property nor has it asked City what development might be permitted. Even assuming no use is acceptable to the City, Company's complaint deals with the alleged overzealous use of the police power by City. Its remedy is mandamus or declaratory relief, not inverse condemnation. Company did in its complaint seek these remedies asserting that City had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element or by applying the zoning and general plan unconstitutionally. However, on the present record these are disputed fact issues not covered by the trial court in its findings and conclusions. They can be dealt with anew should Company elect to retry the case.

The judgment is reversed.

Brown
P.J.

WE CONCUR:

Cologne
J.

Stanford
J.

APPENDIX H

Denial of Petition for Rehearing by the California Court of Appeal, Fourth Appellate District, Division One, dated July 9, 1979

H-1

COURT OF APPEAL - FOURTH DIST.
FILED
JUL 9 1979
ROBERT L. FORD, Clerk
DEPUTY CLERK

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

SAN DIEGO GAS & ELECTRIC COMPANY,
Plaintiff-Respondent,
vs.
CITY OF SAN DIEGO, ETC., ET AL,
Defendants-Appellants.

4 Civil No. 16277

SUPERIOR COURT NO. 357022

BY THE COURT:

The petition for rehearing is denied.

Brown
Presiding Justice

Copies to: Luce, Forward, Hamilton & Scripps-SD
C. Alan Sumption, Esq.-SD
Zumbrun & Hookano-SAC
Attorney General-SD
Attorney General-SF
Superior Court-SD

APPENDIX I

Denial of Petition for Hearing by California Supreme Court, dated August 22, 1979

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 27 1979

I have this day filed Order

In re: 4 Civ. *No.* 16277

San Diego Gas & Electric Co.

vs.

City of San Diego

Respectfully,

G. E. BISHEL
Clerk

68378-877 2-79 4M OSP

APPENDIX J

Notice of Appeal

COURT OF APPEAL - FOURTH DIST.
FILED
OCT 3 - 1979
ROBERT L. FORD, Clerk
DEPUTY CLERK

J-1

4 Civil 16277

(Superior Court,
San Diego County
No. 357022)

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

SAN DIEGO GAS & ELECTRIC COMPANY,

Plaintiff and Appellant,

vs.

CITY OF SAN DIEGO, etc., et al.,

Defendants and Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF UNITED STATES

Louis E. Goebel
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California 92101
(714) 236-1414

Attorneys for Plaintiff and
Appellant San Diego Gas &
Electric Company

4 Civil 16277

(Superior Court,
San Diego County
No. 357022)

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

SAN DIEGO GAS & ELECTRIC COMPANY,

Plaintiff and Appellant,

vs.

CITY OF SAN DIEGO, etc., et al.,

Defendants and Appellees.

NOTICE IS HEREBY GIVEN that SAN DIEGO GAS & ELECTRIC COMPANY, Plaintiffs and Appellants above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, entered in this action on August 22, 1979, denying hearing after decision by the Court of Appeal, Fourth Appellate District.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: October 3, 1979

Respectfully submitted,

LUCE, FORWARD, HAMILTON & SCRIPPS

By _____

Louis E. Goebel, Attorneys
for Plaintiff and Appellant
San Diego Gas & Electric Company

APPENDIX K

(1) Constitutional Provisions

(2) Statutes

(3) Ordinances and Resolutions

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATUTES

California Government Code Sections 6950-54

§ 6950. Legislative intent

It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.
Added Stats. 1959 ch 1658 § 1.

§ 6951. Legislative findings

The Legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban and metropolitan development.
Added Stats 1959 ch 1658 § 1.

§ 6952. Necessity for sound and proper urban and metropolitan development

The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions.
Added Stats 1959 ch 1658 § 1.

§ 6953. Acquisition of interests or rights in real property for preservation of open spaces and areas of public purpose

The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced, and that any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual

right necessary to achieve the purposes of this chapter. Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.
Added Stats 1959 ch 1658 § 1.

§ 6954. "Open space" or "open area"

For the purposes of this chapter an "open space" or "open area" is any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.
Added Stats 1959 ch 1658 § 1.

California Government Code Sections 65910-12

§ 65910. Preparation and adoption of ordinance

Every city and county by December 31, 1973, shall prepare and adopt an open-space zoning ordinance consistent with the local open-space plan adopted pursuant to Article 10.5 (commencing with Section 65560) of Chapter 3 of this title.

§ 65911. Variances from ordinance

Variances from the terms of an open-space zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

This section shall be literally and strictly interpreted and enforced so as to protect the interest of the public in the orderly growth and development of cities and counties and in the preservation and conservation of open-space lands.

§ 65912. Legislative intent as to compensation for taking or damaging property

The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a matter which will take or damage private property for public use without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States.
Added Stats 1970 ch 1590 § 16.

California Government Code Sections 65560 *et seq.*

§ 65560. Definitions

(a) "Local open-space plan" is the open-space element of a county or city general plan adopted by the board or council, either as the local open-space plan or as the interim local open-space plan adopted pursuant to Section 65563.

(b) "Open-space land" is any parcel or area of land or water which is essentially unimproved and devoted to an open-space use as defined in this section, and which is designated on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including habitat for fish and wildlife species; areas required for ecologic and other scientific study purposes; rivers, streams, bays and estuaries; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands.

(2) Open space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; areas required for recharge of ground water basins; bays, estuaries, marshes, rivers and streams which are important for the managment of commercial fisheries; and areas containing major mineral deposits, including those in short supply.

(3) Open space for outdoor recreation, including but not limited to, areas of outstanding scenic, historic and cultural value; areas particularly suited for park and recreation purposes, including access

to lakeshores, beaches, and rivers and streams; and areas which serve as links between major recreation and open-space reservations, including utility easements, banks of rivers and streams, trails, and scenic highway corridors.

(4) Open space for public health and safety, including, but not limited to, areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, areas required for the protection of water quality and water reservoirs and areas required for the protection and enhancement of air quality.

§ 65561. Declaration of legislative findings and policy

The Legislature finds and declares as follows:

(a) That the preservation of open-space land, as defined in this article, is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.

(b) That discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents.

(c) That the anticipated increase in the population of the state demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space land and take positive action to carry out such plans by the adoption and strict administration of laws, ordinances, rules and regulations as authorized by this chapter or by other appropriate methods.

(d) That in order to assure that the interests of all its people are met in the orderly growth and development of the state and the preservation and conservation of its resources, it is necessary to provide for the development by the state, regional agencies, counties and cities, including charter cities, of statewide coordinated plans for the conservation and preservation of open-space lands.

(e) That for these reasons this article is necessary for the promotion of the general welfare and for the protection of the public interest in open-space land.

§ 65562. Declaration of legislative intent

It is the intent of the Legislature in enacting this article:

(a) To assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible.

(b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program.

§ 65563. Local open-space plans: Preparation, adoption, and submission

On or before December 31, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction. Every city and county shall by August 31, 1972, prepare, adopt and submit to the Secretary of the Resources Agency, an interim open-space plan, which shall be in effect until December 31, 1973, containing, but not limited to, the following:

(a) The officially adopted goals and policies which will guide the preparation and implementation of the open-space plan; and

(b) A program for orderly completion and adoption of the open-space plan by December 31, 1973, including a description of the methods by which open-space resources will be inventoried and conservation measures determined.

§ 65566. Acquisition, regulation, etc., of open-space land to conform to plan

Any action by a county or city by which open-space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open-space plan.

§ 65567. Requirements as to building permits, subdivision maps, and zoning ordinances

No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.

California Government Code Section 65302

§ 65302. Statement of development policies: Inclusion of diagram and text setting forth objectives, etc.; Elements to be included

The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements:

. . . .

(e) An open-space element as provided in Article 10.5 (commencing with Section 65560) of this chapter.

ORDINANCES AND RESOLUTIONS

RESOLUTION NO. 207761

A RESOLUTION DETERMINING THAT THE PUBLIC INTEREST AND NECESSITY DEMAND THE ACQUISITION, CONSTRUCTION OR COMPLETION OF CERTAIN MUNICIPAL IMPROVEMENTS AND MAKING FINDINGS RELATING THERETO.

BE IT RESOLVED , by the Council of The City of San Diego as follows:

Section 1. That the public interest and necessity demand the acquisition, construction or completion by The City of San Diego of a certain municipal improvement, to wit: to improve, develop and expand the parks and recreational services of the City. The estimated cost of this municipal improvement is the sum of Twenty-five Million Dollars ($25,000,000.00).

Section 2. The public interest or necessity demand the acquisition, construction or completion by The City of San Diego of a certain municipal improvement, to wit: to enhance the environment by the acquisition and improvement of park reserve in the City of San Diego, said park reserve areas to be acquired to be subsequently identified. The estimated cost of this municipal improvement is Twenty-two Million Five Hundred Thousand Dollars ($22,500,000.00). In incurring any general obligation bonded indebtedness to finance the purchase of said park reserve areas, The City of San Diego shall pledge in payment of principal and interest thereon two thirds of the Environmental Growth Fund created by Charter vote of the people for that purpose.

Section 3. The cost of each of the foregoing municipal improvements and the principal amount of the bonded indebtedness proposed to be incurred are and will be too great to be paid out of the ordinary annual income and revenue of the City and will require an expenditure greater than the amount provided by the annual tax levy.

Section 4. Each of the foregoing municipal improvements is necessary and convenient to carry out the objects, purposes and powers of The City of San Diego.

Section 5. This Council intends to submit to the qualified voters of the City at a special municipal bond election to be held in the City on September 18, 1973, and to be consolidated with the Municipal Primary Election to be held on the same date, two (2) propositions for the issuance of general obligation bonds of the City, all of such bond issues being in the principal amount of the estimated cost of each municipal improvement, as recited in this resolution.

APPROVED: JOHN W. WITT, City Attorney

By Peter D. Bulens, Deputy

4/17/73

K-10

RESOLUTION NO. 208180

WHEREAS, the State Planning and Zoning Law requires that the City Council adopt an open space plan prior to June 30, 1973; and

WHEREAS, the Planning Commission held public hearings on May 16 and May 23, 1973, for the purpose of considering an open space plan; and

WHEREAS, the Planning Commission, by Resolution No. 190, adopted May 23, 1973, approved said open space plan and recommended its adoption to the City Council; NOW, THEREFORE,

BE IT RESOLVED, by the Council of The City of San Diego, as follows:

This Council hereby adopts that open space plan described in the Report entitled, "A Plan for the Preservation of Natural Parks for San Diego," on file in the office of the City Clerk as Document No. 743797.

APPROVED: JOHN W. WITT, City Attorney

By Frederick C. Conrad
Frederick C. Conrad, Chief Deputy

6-13-73

Passed and adopted by the Council of The City of San Diego on JUN 19 1973, by the following vote:

Councilmen	Yeas	Nays	Excused	Absent
Gil Johnson	☑	☐	☐	☐
Maureen F. O'Connor	☑	☐	☐	☐
Henry L. Landt	☑	☐	☐	☐
Leon L. Williams	☑	☐	☐	☐
Floyd L. Morrow	☑	☐	☐	☐
Bob Martinet	☑	☐	☐	☐
Allen Hitch	☑	☐	☐	☐
Jim Bates	☑	☐	☐	☐
Mayor Pete Wilson	☐	☐	☐	☑

RECEIVED
CITY CLERK'S OFFICE
1973 JUN 13 PM 2:55
SAN DIEGO, CALIF.

AUTHENTICATED BY:

PETE WILSON
Mayor of The City of San Diego, California.

EDWARD NIELSEN
City Clerk of The City of San Diego, California.

By Mary Anne Inman, Deputy.

Office of the City Clerk, San Diego, California

Resolution Number 208180 Adopted JUN 19 1973

ORDINANCE NO. 11088 JUNE 21, 1973
(New Series)

AN ORDINANCE INCORPORATING PORTIONS OF PUEBLO LOTS 1335, 1336, 1338, 1339, 1340, AND 1362: AND A PORTION OF SECTION 25, TOWNSHIP 14 SOUTH, RANGE 4 WEST, S.B.B.M., IN THE CITY OF SAN DIEGO, CALIFORNIA, INTO A-1-10 ZONE, AS DEFINED BY SECTION 101.0404 OF THE SAN DIEGO MUNICIPAL CODE, AND REPEALING ORDINANCE NO. 10936 (NEW SERIES), ADOPTED OCTOBER 5, 1972, ORDINANCE NO. 13455 APPROVED FEBRUARY 15, 1932, AND ORDINANCE NO. 5591 (NEW SERIES), ADOPTED MAY 19, 1953 OF THE ORDINANCES OF THE CITY OF SAN DIEGO INSOFAR AS THE SAME CONFLICT HEREWITH.

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. That portions of Pueblo Lots 1335, 1336, 1338, 1339, 1340, and 1362; and a portion of Section 25, Township 14 South, Range 4 West, S.B.B.M., in the City of San Diego, California, within the boundary of the district designated "A-1-10" on Zone Map Drawing No. C-377.3, filed in the office of the City Clerk under Document No. 743345 be, and they are hereby incorporated into A-1-10 Zone, as such zone is described and defined by Section 101.0404 of the San Diego Municipal Code.

Section 2. That Ordinance No. 10936 (New Series), adopted October 5, 1972, Ordinance No. 13455 approved February 15, 1932, and Ordinance No. 5591 (New Series), adopted May 19, 1953, of the Ordinances of The City of San Diego be, and the same are hereby repealed insofar as they conflict herewith.

Section 3. This ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: JOHN W. WITT, City Attorney

By Frederick C. Conrad
Frederick C. Conrad, Chief Deputy

Supreme Court, U. S.
FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-678

IN THE
Supreme Court of the United States

October Term, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The California Court Of Appeal,
Fourth Appellate District, Division One

JOINT APPENDIX

Louis E. Goebel
Goebel and Monaghan
Security Pacific Plaza
1200 Third Avenue, Suite 1700
San Diego, California 92101
Telephone: (714) 231-0059

Gordon Pearce
General Counsel
Guenter S. Cohn
Assistant General Counsel
San Diego Gas & Electric Company
101 Ash Street
San Diego, California 92101
Telephone: (714) 235-7822

Counsel for Appellant

Ruth R. Mijuskovic
Luce, Forward, Hamilton & Scripps
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California 92101
Telephone: (714) 236-1414

Of Counsel

1105 Wi 275-3050

Docketed 10/26/79
Jurisdiction Postponed 6/16/80

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RELEVANT DOCKET ENTRIES

Date	Identification
August 15, 1974	Complaint in Inverse Condemnation and Petition for Writ of Mandate filed in San Diego County Superior Court by property owner. (Jt. App. 4)*
September 24, 1974	City Demurrers to Complaint
November 12, 1974	Amendment to Complaint seeking Declaratory Relief (Jt. App. 32)
November 13, 1974	Demurrer to Mandamus Causes of Action Sustained, Demurrer to Inverse Condemnation Cause of Action Overruled
November 24, 1974	Answer to Complaint and Amended Complaint.
January 8, 1976	Order entered for a separate trial on issue of liability.
January 19, 1976	Liability phase of trial begins in San Diego County Superior Court before the Honorable Jack R. Levitt.
April 9, 1976	Findings of Fact and Conclusions of Law, finding for the property owner, entered by the trial court. (Jt. App. 35)
May 3, 1976	Damage phase, tried before jury, begins before the Honorable Jack R. Levitt.

* References to the Joint Appendix will be cited at "Jt. App". References to Appendix to Jurisdictional Statement hereinafter will be cited as "J.S. App.".

Date	Identification
October 8, 1976	Judgment, awarding money damages to property owner, entered by the trial court. (Jt. App. 44)
October 18, 1976	Notice of appeal to California Court of Appeal, Fourth Appellate District, Division One, filed by City.
May 17, 1978	Judgment affirmed by the Court of Appeal. (Jt. App. 48)
June 13, 1978	Petition for Rehearing Denied. (J.S. App. C)
July 13, 1978	Hearing granted by the California Supreme Court. (J.S. App. D)
June 14, 1979	California Supreme Court sent the case to the Court of Appeal for reconsideration in light of *Agins v. Tiburon*. (J.S. App. E)
June 26, 1979	California Court of Appeal, Fourth Appellate District, Division One, reversed judgment of trial court. (Jt. App. 62)
July 9, 1979	Petition for Rehearing denied. (J.S. App. H)
August 22, 1979	Petition for Hearing by California Supreme Court denied. (J.S. App. H)
October 3, 1979	Notice of Appeal to the Supreme Court filed. (J.S. App. J)

RELEVANT PLEADINGS, INSTRUCTIONS, FINDINGS, CONCLUSIONS, OR OPINIONS

Document	Page
1. The Complaint for Damages for Inverse Condemnation and Petition for Writ of Mandamus filed on August 15, 1974	4
2. Amendment to the Complaint filed on November 12, 1974	32
3. Findings of Fact and Conclusions of Law entered on April 9, 1976	35
4. Judgment awarding money damages to property owner entered on October 8, 1976	44
5. Opinion of the California Court of Appeal, affirming the judgment, entered on May 17, 1978 (modified on June 13, 1978)	48
6. Opinion of the California Court of Appeal reversing the judgment, entered on June 26, 1979	63

AUG 15 4 31 PM '74
CALIFORNIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation; PETE WILSON, Mayor, F. GILBERT JOHNSON, MAUREEN O'CONNOR, LEE HUBBARD, LEON L. WILLIAMS, FLOYD L. MORROW, JIM BATES, ROBERT MARTINET, and JAMES ELLIS, Members of the City Council of San Diego; JAMES L. GOFF, Planning Director of the City of San Diego; and DOES I through XXV, inclusive, Defendants.	No. 357022 COMPLAINT FOR DAMAGES FOR INVERSE CONDEMNATION AND PETITIONS FOR WRIT OF MANDAMUS AND RELATED RELIEF Amendment Filed 11-12-74

Plaintiff complains of the defendants and each of them as follows:

FIRST CAUSE OF ACTION

(Taking or Damaging Property By Inverse Condemnation)

I

Plaintiff, SAN DIEGO GAS & ELECTRIC COMPANY, is a California corporation existing under the laws of the State of California and is, and at all times mentioned herein was, the owner of three parcels of real property located in the City of

San Diego in an area commonly known as the Sorrento Valley, immediately adjacent to the Sorrento Valley Industrial Park complex. The first of said parcels is described on Exhibit "A" attached hereto and incorporated herein as though fully set forth, and said parcel shall hereinafter be referred to as "Parcel A". The second parcel is described on Exhibit "B" attached hereto and incorporated herein as though fully set forth, and said parcel shall hereinafter be referred to as "Parcel B". The third parcel is described on Exhibit "C" attached hereto and incorporated herein as though fully set forth, and said parcel shall hereinafter be referred to as "Parcel C". All three parcels, for purposes of convenience, may hereinafter be referred to collectively as the "subject property".

II

At all times herein mentioned, defendant CITY OF SAN DIEGO was and is a municipal corporation under its charter and under the laws and statutes of the State of California. Said defendant shall hereinafter be referred to as "the City".

III

The remaining named defendants were and are officers of the CITY OF SAN DIEGO, as follows:

PETE WILSON, Mayor;

F. GILBERT JOHNSON, MAUREEN O'CONNOR, LEE HUBBARD, LEON L. WILLIAMS, FLOYD L. MORROW, JIM BATES, ROBERT MARTINET, and JAMES ELLIS, Members of the City Council;

JAMES L. GOFF, Planning Director.

IV

Plaintiff is unaware of the true names and capacities of the defendants sued herein by fictitious names DOES I through XXV, inclusive, and will seek leave of Court to substitute the true names and capacities of said defendants when same have been ascertained. Plaintiff is informed and believes, and upon such information and belief alleges, that the defendants, and each of them, sued herein under fictitious names were and are the agents, servants, and employees of each of the named defendants, and are responsible for the injuries alleged herein and are necessary for the granting of the relief sought herein.

V

The subject property was acquired by plaintiff, SAN DIEGO GAS & ELECTRIC COMPANY, in 1966. At that time, there were discussions between plaintiff and authorized representatives of the CITY OF SAN DIEGO with regard to the suitability of the subject property for use by plaintiff for development and expansion of its operating facilities, and, in fact, some 25 acres, a portion Parcel C, were purchased directly from the CITY OF SAN DIEGO for the express purpose of forming a part of an assemblage then being acquired by plaintiff for such purposes.

VI

In 1972, the San Diego City Council directed the Planning Commission to initiate public hearings upon the rezoning of the subject property to A-1-10 or "any other appropriate zone". Plaintiff is informed and believes, and upon such information and belief alleges, that concurrently with said action, and continuing thereafter, the City, through its Planning Department and its Community Development Department, engaged in

activities which were planned, coordinated, and implemented with the conscious design and intent to deprive plaintiff of any practical, beneficial or economical use of the subject property and, in fact, to take plaintiff's property for public use without compensation or to reduce dramatically the amount of the compensation which would have to be paid if the City subsequently acquired the property by exercise of its power of eminent domain. The actions taken by defendants, and each of them, including the City and its departments and agencies, in furtherance of said design and intent include, but are not limited to, the following.

VII

The Planning Department prepared a plan entitled, "A Plan for the Preservation of Natural Parks for San Diego," a proposed open space element to the City's General Plan, and scheduled public hearings thereon. A noticed public hearing before the Planning Commission was held on May 16, 1973, to consider a plan which designated Parcel A and a portion of Parcel C as open space. The hearing was continued to May 23, 1973, for determination. Plaintiff is informed and believes, and upon such information and belief alleges, that prior to the May 23, 1973 hearing, the Planning Department, in consultation with the Community Development Department, without notice to the public or to plaintiff, revised the plan under consideration to include Parcel B and additional portions of Parcel C. A plan in the latter form was adopted on May 23, 1973, by the Planning Commission and sent to the City Council for action.

VIII

Plaintiff is informed and believes, and upon such information and belief alleges, that concurrently with the actions set forth

herein above and in consultation with the Planning Department, the Community Development Department was preparing plans for acquisition by purchase of land by the City for open space. The Community Development Department prepared and distributed a report entitled, "Staff Reprt, Park Reserve Systems, April 29, 1973" which contained a map designated Parcels A, B and C for acquisition as open space. Said report further contained a proposal for funding of said purchase by bonds, and specifically allocated funds to be used for the purchase of plaintiff's property. Plaintiff is informed and believes that the funds allocated in said report were grossly inadequate for the purchase of the subject property at its then existing zoning and condition, but rather that the allocation clearly illustrates the intent of defendants to acquire the subject property only after its value had been dramatically reduced by the change of zoning and imposition for other restrictive conditions. Said report was presented to the City Council meeting in conference on May 30, 1973. Subsequently, the report was adopted by the Council and the bond proposal was placed upon the September 18, 1973, ballot as Proposition B. In conjunction with said ballot proposition, defendants released to the news media information depicting in graphic detail the entire subject property as property sought to be acquired, and said information was widely desseminated to the public.

IX

On April 11, 1973, the Planning Commission down-zoned Parcel A from M-1A to A-1-10, but voted to retain the existing M-1A zoning on Parcel B, and voted to retain the existing A-1-1 zoning on Parcel C, with the recommendation that Parcel C be considered for M-1A zoning upon presentation of a specific development plan.

X

On June 7, 1973, the City Council adopted the recommendation of the Planning Commission and down-zoned Parcel A from M-1A to A-1-10, while voting to retain the existing M-1A zoning on Parcel B, and voting to retain the existing A-1-1 zoning on Parcel C, with the recommendation that Parcel C be considered for M-1A zoning upon presentation of a specific development plan, all despite the fact that all of the subject property was designated for industrial use on the City of San Diego General Plan 1990, adopted by the City Council on January 27, 1972.

XI

On June 19, 1973, the City Council accepted the recommendation of the Planning Commission and adopted the open space plan described in the report entitled, "A Plan for the Preservation of Natural Parks for San Diego", thereby completing the implementation of the aforesaid design, by means of resolution or ordinance, and depriving plaintiff of any practical, beneficial or economical use of the subject property. Said action was taken without proper notice to plaintiff or to the public of the nature and extent of the application of the open space plan to the subject property, and, in fact, the Plan was filed with the City Clerk prior to the public hearing indicated taht only Parcel A and a portion of Parcel C were proposed to be included in the open space plan. The Plan as adopted purported to include all of Parcels A, B, and C in the open space plan, even though there was no notice to plaintiff that such action was contemplated and no discussion of same at the public hearing.

XII

Plaintiff is informed and believes, and upon such information and belief alleges, that the plan, purpose, design and intention of defendants and each of them, in connection with their actions as alleged herein, was and is to limit the subject property to public use as open space and to render said property unusable for any other purpose, and upon the implementation as hereinabove alleged by resolution and/or ordinance, said design and intent was fulfilled and in all practical effect the subject property has by the aforesaid actions of the defendants been presently taken and devoted to public use as open space. Plaintiff is informed and believes, and upon such information and belief alleges, that a further plan, purpose and intention of defendants, and each of them, in connection with their actions, as alleged herein, was and is to substantially reduce the value of the subject property so that said property might be acquired by the CITY OF SAN DIEGO for public use in the future at a greatly reduced value.

XIII

No action in eminent domain has been taken by the CITY OF SAN DIEGO within six months from the actions taken on June 7, 1973, and June 19, 1973, as herein alleged, in order to take the subject property or any portion thereof, as provided in Section 1243.1 of the California Code of Civil Procedure.

XIV

Accordingly, on June 6, 1974, plaintiff's representatives submitted a claim, pursuant to the California Government Code, to the CITY OF SAN DIEGO. A copy of said claim is attached hereto, marked as Exhibit "D", and is incorporated herein by

reference. On August 5, 1974, a denial of said claim was issued. A copy of said denial is attached hereto as Exhibit "E", and is incorporated herein by reference.

XV

The aforesaid acts of defendants, and each of them, were and are arbitrary, oppressive, unreasonable and an unreasonable exercise of the purported police power of the City. Said acts constitute an unlawful taking or damaging, or both, of the subject property owned by plaintiff. As a result of the aforesaid acts of defendants, and each of them, plaintiff has been presently denied in all practical effect any possible beneficial or economical use of the subject property.

XVI

The damage or loss to plaintiff from the conduct of defendants, as alleged hereinabove, is the approximate sum of $6,150,000.00, plus reasonable interest on said amount, plus such sum as will reimburse plaintiff for its reasonable costs and disbursements, including reasonable attorneys' fees, appraisal and engineering fees, actually incurred because of this proceeding, as provided in California Code of Civil Procedure, Section 1246.3.

SECOND CAUSE OF ACTION
AND PETITION FOR WRIT OF MANDATE
(CCP §1084)

Petitioner SAN DIEGO GAS AND ELECTRIC COMPANY petitions this Court for a writ of mandamus under Code of Civil Procedure Section 1084, directed to respondent CITY OF SAN DIEGO, and in support thereof alleges as follows:

I

Petitioner repeats and repleads each, every and all of the allegations contained in Paragraphs I through XVI of its First Cause of Action, and incorporates the same herein by reference as though fully set forth.

II

For the reasons set forth as the contentions and allegations of petitioner in its First Cause of Action, and upon the facts set forth in Paragraphs I through XVI of said First Cause of Action, all of which is incorporated herein by reference, petitioner alleges that the actions of respondent were arbitrary, oppressive, unreasonable and an unlawful exercise of the purported police power of the City, in abuse of its discretion.

III

The adoption of the proposed open-space element to the City's General Plan, as alleged herein, without notice to the public or to petitioner of the nature and extent of the impact of said element upon the subject property, constituted a denial of due process and an unlawful taking and/or damaging of petitioner's property without due process of law.

IV

Petitioner has exhausted all administrative remedies, if any, available to petitioner under the circumstances.

V

Petitioner does not have a plain, speedy, or adequate remedy at law for the actions taken by the CITY OF SAN DIEGO and each of the other respondents herein.

THIRD CAUSE OF ACTION AND PETITION FOR WRIT OF MANDATE
(CCP §1094.5)

Petitioner SAN DIEGO GAS & ELECTRIC COMPANY petitions this court for a writ of mandamus under Code of Civil Procedure, Section 1094.5, directed to respondent CITY OF SAN DIEGO, and in support thereof alleges as follows:

I

Peitioner [*sic*] repeats and repleads each, every and all of the allegations contained in Paragraphs I through XVI of this First Cause of Action and Paragraphs I through V of its Second Cause of Action, and incorporates the same herein by reference as though fully set forth herein.

II

For the reasons set forth hereinabove and upon the facts alleged herein, all of which are incorporated herein by reference, petitioner alleges that the actions of respondent were arbitrary, oppressive, unreasonable and an unlawful exercise of the purported police power of respondent, in abuse of its discretion.

III

The adoption of the proposed open space element to the City's General Plan, as alleged herein, without notice to the public or to petitioner of the nature and extent of the impact of said element upon the subject property, consituted a denial of due process and denied petitioner a fair hearing on said element, and thereby constituted an unlawful taking and/or damaging of petitioner's property without due process.

WHEREFORE, plaintiff prays for judgment against the defendants, and each of them, as follows:

1. For the principal sum of $6,150,000.00, together with reasonable interest thereon, from and after the date of taking and/or damaging of plaintiff's property;

2. For plaintiff's reasonable costs, disbursements and expenses, including reasonable attorneys' fees, and appraisal and engineering fees, in accordance with California Code of Civil Procedure §1246.3;

3. That a preemptory writ of mandate be issued under seal of this court ordering respondent, CITY OF SAN DIEGO, through its officers and agents, to set aside the re-zoning of that portion of the subject property herein referred to as Parcel A, and also ordering respondent, CITY OF SAN DIEGO, to set aside the adoption of that portion of the open-space element of its General Plan applicable to the subject property; and

4. For such other and further relief as this Court may deem just and proper.

DATED: August 15, 1974

GORDON PEARCE
C. EDWARD GIBSON
LUCE, FORWARD, HAMILTON & SCRIPPS

By /s/
Louis E. Goebel, Attorneys for
Plaintiff SAN DIEGO GAS &
ELECTRIC COMPANY

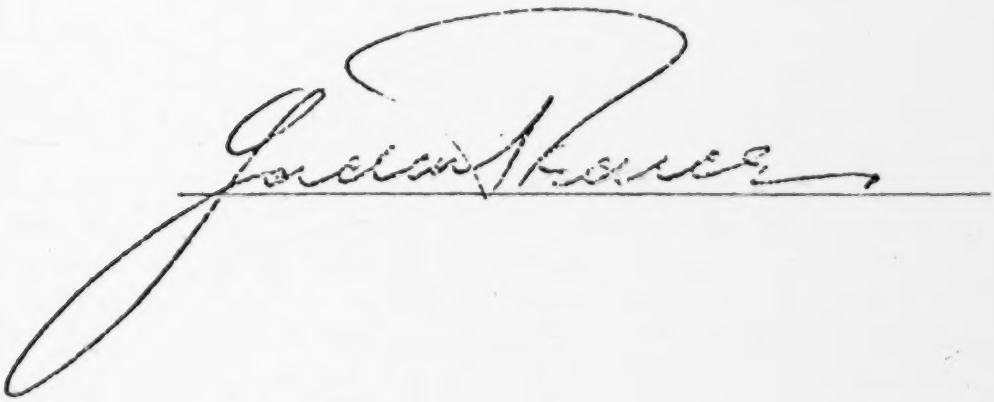
VERIFICATION

I, GORDON PEARCE, declare:

I am an officer, to wit: VICE-PRESIDENT, of San Diego Gas & Electric Company, a corporation, plaintiff in the above-entitled action; I have read the foregoing Complaint for Damages for Inverse Condemnation, and Petitions for Writ of Mandamus and Related Relief and know the contents thereof; I declare that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14 day of August, 1974, at San Diego, California.



PARCEL "A"

All that portion of Pueblo Lot 1339 of the Pueblo Lands of San Diego in the City of San Diego, County of San Diego, State of California, according to the Map thereof made by James Pascoe in 1870, of San Diego County, November 14, 1921, and is known as Miscellaneous Map No. 36, described as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "A"; thence from said TRUE POINT OF BEGINNING of Parcel "A" North 46° 30′ 09″ West along the common boundary line between said Pueblo Lands of San Diego and Section 25, Township 14 South, Range 4 West, San Bernardino Base and Meridian, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 1955.69 feete to the Northeast corner of said Pueblo Lot 1339; thence North 89° 00′ 29″ West along the Northerly line of said Pueblo Lot 1339, a distance of 917.53 feet to a point of intersection with the Northeasterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed dated April 21, 1909, recorded in Book 461 at Page 372 of Deeds, Records of said County of San Diego; thence South 39° 53′ 12″ East, along said Northeasterly line of the railroad, a distance of 1491.02 feet to the beginning of a tangent curve concave Northeasterly and having a radius of 5654.65 feeet; thence Southeasterly along the arc of said curve through a central angle of 07° 58′ 20″ East, a distance of 102.00 feet; thence leaving said Northeasterly line of the railroad North 65° 44′ 51″ East, a distance of 937.97 feet to the TRUE POINT OF BEGINNING of Parcel "A".

Containing 38.74 acres, more or less.

EXHIBIT A

PARCEL "B"

Those certain portions of Pueblo Lots 1339 and 1362 of the Pueblo Lands of San Diego, according to the Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder of San Diego County November 14, 1921 and is known as Miscellaneous Map No. 36; being described as a whole as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "B"; thence from said TRUE POINT OF BEGINNING of Parcel "B" South 46° 30′ 09″ East along the common boundary line between said Pueblo Lands of San Diego and Section 25, Township 14 South, Range 4 West, San Bernardino Base and Meridian, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 2633.79 feet; thence South 01° 04′ 56″ East, a distance of 56.57 feet; thence South 50° 16′ 35″ East, a distance of 251.96 feet; thence South 38° 42′ 00″ East, a distance of 393.64 feet to a point of intersection with the Southerly line of the Northerly 50 acres of said Pueblo Lot 1362; thence South 75° 33′ 21″ West along said Southerly line of the Northerly 50 acres of said Pueblo Lot 1362, a distance of 968.66 feet to a point of intersection with the Northeasterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed dated April 21, 1909, recorded in Book 461 at Page 372 of Deeds, Records of said County of San Diego; thence North 45° 58′ 20″ West along said Northeasterly line of the railroad, a distance of 1545.93 feet to a point of intersection with the Westerly line of said Pueblo Lot 1362; thence North 14° 23′ 47″ West along said Westerly line, a distance of 104.43 feet to the Southerly line of said Pueblo Lot 1339; thence North 89° 07′ 59″ West along said Southerly line of Pueblo Lot 1339, a distance of 148.48 feet to another point of intersection with the Northeasterly line of the railroad; thence North 45° 58′ 20″ West along said Northeasterly line of the railroad, a distance of 1346.01 feet; thence leaving said Northeasterly line of the railroad North 65° 44′ 51″ East, a distance of 937.97 feet to the TRUE POINT OF BEGINNING of Parcel "B".

Containing 65.40 acres, more or less.

PARCEL "B-1"

Those portions of Pueblo Lots 1335 and 1362 of the Pueblo Lands of San Diego, according to Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder for San Diego County November 14, 1921, and is known as Miscellaneous Map No. 36, described as a whole as follows:

Commencing at the Northwest corner of said Pueblo Lot 1335; thence South 0° 55′ 16″ West along the Westerly line of said Pueblo Lot 1335, a distance of 309.84 feet to a point of intersection with the Southwesterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed recorded August 2, 1900 in Book 474 at Page 7 and also by Deed dated April 21, 1909, recorded in Book 461 at Page 372, both of Deeds, Records of said County of San Diego, said point of intersection being the TRUE POINT OF BEGINNING of the property herein described in Parcel "B-1" thence from said TRUE POINT OF BEGINNING of Parcel "B-1" continuing South 0° 55′ 16″ West along the Westerly line of said Pueblo Lot 1335, a distance of 1112.10 feet; thence leaving said Westerly line of Pueblo Lot 1335 North 37° 34′ 47″ East, a distance of 495.28 feet; thence South 44° 05′ 16″ East, a distance of 46.27 feet to a point of intersection with the common boundary line between said Pueblo Lots 1335 and 1362; thence South 15° 28′ 47″ East along said common boundary line, a distance of 415.56 feet to the Southerly line of the Northerly 50 acres of said Pueblo Lot 1362; thence North 75° 33′ 21″ East along said Southerly line of the Northerly 50 acres, a distance of 631.60 feet to another point of intersection with the Southwesterly line of the railroad; thence North 45° 58′ 20″ West along said Southwesterly line of the railroad, a distance of 1435.18 feet to the TRUE POINT OF BEGINNING of Parcel "B'1".

POINT OF BEGINNING of Parcel "B-1".

Containing 12.24 acres, more or less.

PARCEL "C"

Those certain portions of Lots 4, 5, 6, 7 and the Southeast Quarter of the Northeast Quarter of Section 25, Township 14 South, Range 4 West, together with that portion of Lot 4 of Section 30, Township 14 South, Range 3 West, all within the San Bernardino Base and Meridian in the City of San Diego, County of San Diego, State of California, according to the Official Plat thereof described as a whole as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "C" thence from said TRUE POINT OF BEGINNING of Parcel "C" South 46° 30′ 09″ East along the common boundary line between said Sections 25 and 30 and the Pueblo Lands of San Diego, according to Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder of San Diego County November 14, 1921 and is known as Miscellaneous Map No. 36, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 2633.79 feet; thence North 01° 04′ 56″ West, a distance of 286.32 feet; thence North 46° 25′ 56″ West, a distance of 189.19 feet; thence North 22° 39′ 32″ West, a distance of 214.89 feet; thence North 15° 42′ 27″ West, a distance of 472.39 feet; thence North 13° 49′ 04″ West, a distance of 392.47 feet; thence North 18° 31′ 25″ East, a distance of 90.14 feet; thence North 15° 10′ 00″ West, a distance of 273.57 feet; thence North 16° 30′ 35″ West, a distance of 168.81 feet; thence South 89° 30′ 06″ West, a distance of 333.41 feet; thence North 42° 10′ 06″ West, a distance of 16.27 feet to the beginning of a tangent curve concave Easterly, having a radius of 400.00 feet; thence Northwesterly and Northerly along the arc of said curve through a central angle of 59° 08′ 30″, a distance of 412.89 feet; thence tangent to said curve North 16° 58′ 24″ East, a distance of 59.49 feet; thence South 87° 42′ 06″ East, a distance of 113.42 feet; thence South 80° 56′ 06″ East, a distance of 88.94 feet to the beginning of a tangent curve concave Northerly, having a radius of 270.00 feet; thence Easterly along the arc of said curve through a central angle of 17° 28′ 41″ a distance of 82.36 feet to a point therein; a radial of said curve passing through last said

point bears South 08° 24′ 47″ East; thence from last said point North 14° 39′ 43″ West, a distance of 252.83 feet; thence North 27° 31′ 06″ West, a distance of 104.53 feet; thence South 76° 36′ 25″ West, a distance of 95.67 feet; thence North 10° 51′ 04″ West, a distance of 153.85 feet; thence North 05° 00′ 03″ West, a distance of 136.54 feet; thence South 65° 44′ 51″ West, a distance of 923.00 feet; thence South 24° 15′ 09″ East, a distance of 670.00 feet; thence South 65° 44′ 51″ West, a distance of 472.00 feet to the TRUE POINT OF BEGINNING of Parcel "C".

Containing 49.52 acres, more or less.

BEFORE THE CITY OF SAN DIEGO

IN THE MATTER OF THE CLAIM OF SAN DIEGO GAS & ELECTRIC COMPANY,

Claimant.

RECEIVED
1974 JAN -3 PM 1:08
SAN DIEGO, CALIF.

Pursuant to Section 910 of the California Government Code, SAN DIEGO GAS AND ELECTRIC COMPANY, a California corporation, through its counsel, hereby claims against the CITY OF SAN DIEGO in the sum of $6,150,000, and in support of this claim states as follows:

I

The damages and injuries which are the subject of this claim occurred on or about June 7, 1973, and June 19, 1973, at San Diego, California and have continued thereafter. This claim involves three parcels of real property located in the City of San Diego in an area commonly known as the Sorrento Valley, immediately adjacent to the Sorrento Valley Industrial Park complex. The first parcel is described on Exhibit "A" attached hereto and incorporated herein as though fully set forth, and said parcel shall hereinafter be referred to as "Parcel A". The second parcel is described on Exhibit "B" attached hereto and incorporated herein as though fully set forth,, and said parcel shall hereinafter be referred to as "Parcel B". The third parcel is described on Exhibit "C" attached hereto and incorporated herein as though fully set forth, and said parcel shall hereinafter be referred to as "Parcel C".

II

The damages and injuries occurred in the following manner:

Parcels A, B and C were originally acquired by claimant, San Diego Gas & Electric Company, in 1966. At that time, there was discussions

between the claimant and authorized representatives of the City of San Diego with regard to the suitability of the property for use by claimant for development and expansion of its operating facilities, and, in fact, some 25 acres, a portion of Parcel C, were purchased directly from the City of San Diego for the express purpose of forming a part of an assemblage being acquired by claimant for such purposes.

In 1972, the San Diego City Council directed the Planning Commission to initiate public hearings upon the re-zoning of the property which is the subject of this claim to A-1-10 or "any other appropriate zone". Claimant is informed and believes that concurrently therewith and continuing thereafter, the City through its Planning Department and its Community Development Department, engaged in activities which were planned, coordinated, and implemented with the conscious design and intent to deprive claimant of any practical, beneficial or economical use of the property and, in fact, to take claimant's property for public use without compensation or to reduce dramatically the amount of the award which would have had to be paid if the City subsequently acquired the property by exercise of its power of eminent domain.

The actions taken by the City and its departments and agencies in furtherance of said design and intent include, but are not limited to, the following. The Planning Department prepared a plan entitled, "A Plan for the Preservation of Natural Parks for San Diego," the open space element to the City's General Plan, and held public hearings thereon. A noticed public hearing was held on May 16, 1973, to consider a plan which designated Parcel A and a portion of Parcel C as open space. The hearing was continued to May 23, 1973, for determination. Claimant is informed and believes that prior to the May 23, 1973 hearing, the Planning Department, in consultation with the Community Development Department, without notice to the public or to the claimant, revised the plan under consideration to include Parcel B and additional portions of Parcel C. A plan in the latter form was adopted on May 23, 1973, and sent to the City Council for action.

Claimant is informed and believes that concurrently therewith and in consultation with the Planning Department, the Community Development Department was preparing plans for acquisition by purchase of land by the City for open space. The Community Development Department prepared and distributed a report entitled, "Staff Report, Park Reserve Systems, April 29, 1973" which contained a map earmarking Parcels A, B and C for acquisition as open space. Said report further contained a proposal for funding of said purchase by bonds, and specifically allocated funds to be used for the purchase of claimant's property. Said report was presented to the City Council meeting in conference on May 30, 1973. Subsequently, the report was adopted by the Council and the bond proposal placed upon the September 18, 1973, ballot as Proposition B.

On April 11, 1973, the Planning Commission down-zoned Parcel A from M-1A to A-1-10, but voted to retain the existing M-1A zoning on Parcel B, and voted to retain the existing A-1-1 zoning on Parcel C, with the recommendation that Parcel C be considered for M-1A zoning upon presentation of a specific development plan.

On June 7, 1973, the City Council adopted the recommendation of the Planning Commission and down-zoned Parcel A from M-1A to A-1-10, while voting to retain the existing M-1A zoning on Parcel B, and voting to retain the existing A-1-1 zoning on Parcel C, with the recommendation that Parcel C be considered for M-1A upon presentation of a specific development plan, all despite the fact that all of the subject property was designated for industrial use on the City of San Diego General Plan 1990, adopted by the City Council on January 27, 1972.

On June 19, 1973, the City Council accepted the recommendation of the Planning Commission and adopted the open space plan described in the report entitled, "A Plan for the Preservation of Natural Parks for San Diego", thereby completing the implementation of the aforesaid design by resolution or ordinance and depriving claimant of any practical, beneficial or economical use of the subject property.

III

On numerous occasions claimant has expressed to various officials acting on behalf of the City of San Diego its position that the foregoing acts on the part of the City constituted a wrongful taking and/or damaging of claimant's property, since those actions effectively deprived claimant of any possible beneficial or economical use of claimant's property without compensation.

IV

The names of the City agencies causing the aforesaid damage, to the best of claimant's knowledge at this time, are the Planning Department, the Community Development Department, the Planning Commission, and the City Council, and the members, agents and employees thereof.

V

The basis of computation of the amount claimed is based upon the fair market value of Parcels A, B, and C at the time of taking as set forth hereinabove.

VI

Claimant's counsel is aware of persons having knowledge of the circumstances surrounding the claim, as well as documents setting forth the facts, and would be pleased to meet with representatives of the City to discuss, in further detail, the facts, the persons involved, and the documents available.

VII

This claim is made and instituted, *inter alia*, on the basis of the provisions set forth in California Code of Civil Procedure §1243.1 and the United States and California Constitutions.

VIII

Notice is hereby given that claims for any and all costs and expenses incurred in conducting this claim or subsequent litigation, including, but not limited to, costs of suit, costs of expert witnesses, costs of expert consultant witnesses and attorneys' fees will also be presented, all in amounts to be determined as the case progresses.

IX

The post office address of the claimant is as follows:

San Diego Gas & Electric Company
Engineering Land Department
Post Office Box 1831
San Diego, California, 92112

The post office address of claimant's counsel to which all notices concerning this claim should be sent is:

Louis E. Goebel, Esq.
Luce, Forward, Hamilton & Scripps
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California, 92101

DATED: 6/6/74

GORDON PEARCE
C. EDWARD GIBSON
LUCE, FORWARD,
HAMILTON & SCRIPPS

By: LOUIS E. GOEBEL
Louis E. Goebel, Attorneys
for Claimant

PARCEL "A"

All that portion of Pueblo Lot 1339 of the Pueblo Lands of San Diego in the City of San Diego, County of San Diego, State of California, according to the Map thereof made by James Pascoe in 1870, of San Diego County, November 14, 1921, and is known as Miscellaneous Map No. 36, described as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "A"; thence from said TRUE POINT OF BEGINNING of Parcel "A" North 46° 30' 09" West along the common boundary line between said Pueblo Lands of San Diego and Section 25, Township 14 South, Range 4 West, San Bernardino Base and Meridian, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 1955.69 feete to the Northeast corner of said Pueblo Lot 1339; thence North 89° 00' 29" West along the Northerly line of said Pueblo Lot 1339, a distance of 917.53 feet to a point of intersection with the Northeasterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed dated April 21, 1909, recorded in Book 461 at Page 372 of Deeds, Records of said County of San Diego; thence South 39° 53' 12" East, along said Northeasterly line of the railroad, a distance of 1491.02 feet to the beginning of a tangent curve concave Northeasterly and having a radius of 5654.65 feeet; thence Southeasterly along the arc of said curve through a central angle of 07° 58' 20" East, a distance of 102.00 feet; thence leaving said Northeasterly line of the railroad North 65° 44' 51" East, a distance of 937.97 feet to the TRUE POINT OF BEGINNING of Parcel "A".

Containing 38.74 acres, more or less.

EXHIBIT A

PARCEL "B"

Those certain portions of Pueblo Lots 1339 and 1362 of the Pueblo Lands of San Diego, according to the Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder of San Diego County November 14, 1921 and is known as Miscellaneous Map No. 36; being described as a whole as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "B"; thence from said TRUE POINT OF BEGINNING of Parcel "B" South 46° 30′ 09″ East along the common boundary line between said Pueblo Lands of San Diego and Section 25, Township 14 South, Range 4 West, San Bernardino Base and Meridian, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 2633.79 feet; thence South 01° 04′ 56″ East, a distance of 56.57 feet; thence South 50° 16′ 35″ East, a distance of 251.96 feet; thence South 38° 42′ 00″ East, a distance of 393.64 feet to a point of intersection with the Southerly line of the Northerly 50 acres of said Pueblo Lot 1362; thence South 75° 33′ 21″ West along said Southerly line of the Northerly 50 acres of said Pueblo Lot 1362, a distance of 968.66 feet to a point of intersection with the Northeasterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed dated April 21, 1909, recorded in Book 461 at Page 372 of Deeds, Records of said County of San Diego; thence North 45° 58′ 20″ West along said Northeasterly line of the railroad, a distance of 1545.93 feet to a point of intersection with the Westerly line of said Pueblo Lot 1362; thence North 14° 23′ 47″ West along said Westerly line, a distance of 104.43 feet to the Southerly line of said Pueblo Lot 1339; thence North 89° 07′ 59″ West along said Southerly line of Pueblo Lot 1339, a distance of 148.48 feet to another point of intersection with the Northeasterly line of the railroad; thence North 45° 58′ 20″ West along said Northeasterly line of the railroad, a distance of 1346.01 feet; thence leaving said Northeasterly line of the railroad North 65° 44′ 51″ East, a distance of 937.97 feet to the TRUE POINT OF BEGINNING of Parcel "B".

Containing 65.40 acres, more or less.

PARCEL "B-1"

Those portions of Pueblo Lots 1335 and 1362 of the Pueblo Lands of San Diego, according to Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder for San Diego County November 14, 1921, and is known as Miscellaneous Map No. 36, described as a whole as follows:

Commencing at the Northwest corner of said Pueblo Lot 1335; thence South 0° 55' 16" West along the Westerly line of said Pueblo Lot 1335, a distance of 309.84 feet to a point of intersection with the Southwesterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed recorded August 2, 1900 in Book 474 at Page 7 and also by Deed dated April 21, 1909, recorded in Book 461 at Page 372, both of Deeds, Records of said County of San Diego, said point of intersection being the TRUE POINT OF BEGINNING of the property herein described in Parcel "B-1" thence from said TRUE POINT OF BEGINNING of Parcel "B-1" continuing South 0° 55' 16" West along the Westerly line of said Pueblo Lot 1335, a distance of 1112.10 feet; thence leaving said Westerly line of Pueblo Lot 1335 North 37° 34' 47" East, a distance of 495.28 feet; thence South 44° 05' 16" East, a distance of 46.27 feet to a point of intersection with the common boundary line between said Pueblo Lots 1335 and 1362; thence South 15° 28' 47" East along said common boundary line, a distance of 415.56 feet to the Southerly line of the Northerly 50 acres of said Pueblo Lot 1362; thence North 75° 33' 21" East along said Southerly line of the Northerly 50 acres, a distance of 631.60 feet to another point of intersection with the Southwesterly line of the railroad; thence North 45° 58' 20" West along said Southwesterly line of the railroad, a distance of 1435.18 feet to the TRUE POINT OF BEGINNING of Parcel "B'1".

POINT OF BEGINNING of Parcel "B-1".

Containing 12.24 acres, more or less.

PARCEL "C"

Those certain portions of Lots 4, 5, 6, 7 and the Southeast Quarter of the Northeast Quarter of Section 25, Township 14 South, Range 4 West, together with that portion of Lot 4 of Section 30, Township 14 South, Range 3 West, all within the San Bernardino Base and Meridian in the City of San Diego, County of San Diego, State of California, according to the Official Plat thereof described as a whole as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "C" thence from said TRUE POINT OF BEGINNING of Parcel "C" South 46° 30′ 09″ East along the common boundary line between said Sections 25 and 30 and the Pueblo Lands of San Diego, according to Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder of San Diego County November 14, 1921 and is known as Miscellaneous Map No. 36, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 2633.79 feet; thence North 01° 04′ 56″ West, a distance of 286.32 feet; thence North 46° 25′ 56″ West, a distance of 189.19 feet; thence North 22° 39′ 32″ West, a distance of 214.89 feet; thence North 15° 42′ 27″ West, a distance of 472.39 feet; thence North 13° 49′ 04″ West, a distance of 392.47 feet; thence North 18° 31′ 25″ East, a distance of 90.14 feet; thence North 15° 10′ 00″ West, a distance of 273.57 feet; thence North 16° 30′ 35″ West, a distance of 168.81 feet; thence South 89° 30′ 06″ West, a distance of 333.41 feet; thence North 42° 10′ 06″ West, a distance of 16.27 feet to the beginning of a tangent curve concave Easterly, having a radius of 400.00 feet; thence Northwesterly and Northerly along the arc of said curve through a central angle of 59° 08′ 30″, a distance of 412.89 feet; thence tangent to said curve North 16° 58′ 24″ East, a distance of 59.49 feet; thence South 87° 42′ 06″ East, a distance of 113.42 feet; thence South 80° 56′ 06″ East, a distance of 88.94 feet to the beginning of a tangent curve concave Northerly, having a radius of 270.00 feet; thence Easterly along the arc of said curve through a central angle of 17° 28′ 41″ a distance of 82.36 feet to a point therein; a radial of said curve passing through last said

point bears South 08° 24′ 47″ East; thence from last said point North 14° 39′ 43″ West, a distance of 252.83 feet; thence North 27° 31′ 06″ West, a distance of 104.53 feet; thence South 76° 36′ 25″ West, a distance of 95.67 feet; thence North 10° 51′ 04″ West, a distance of 153.85 feet; thence North 05° 00′ 03″ West, a distance of 136.54 feet; thence South 65° 44′ 51″ West, a distance of 923.00 feet; thence South 24° 15′ 09″ East, a distance of 670.00 feet; thence South 65° 44′ 51″ West, a distance of 472.00 feet to the TRUE POINT OF BEGINNING of Parcel "C".

Containing 49.52 acres, more or less.

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JOHN W. WITT
CITY ATTORNEY

August 5, 1974

Luce, Forward, Hamilton & Scripps
1700 Bank of California Plaza
110 West A Street
San Diego, CA 92101

Attention: Louis E. Goebel, Esq.

Gentlemen:

Claim of San Diego Gas & Electric Company filed
on June 6, 1974

Your claim, which was filed some time ago against The City of San Diego, was referred to this office for investigation and a determination of legal liability.

As you may know, the liability of a municipality to persons who claim damages is strictly limited by the Acts of the Legislature of the State of California governing municipal operations.

Because subsequent investigation and legal opinion determined that your claim cannot be honored, and because no formal denial has been caused to be issued by The City of San Diego within the 45-day time period as prescribed in California Government Code, Section 912.3, your claim is deemed denied by operation of that law.

This letter is to advise you of the denial of your claim and to inform you that in the event you desire to pursue this matter further, that you must do so in compliance with the time limits set forth in Government Code, Section 945.6.

Sincerely yours,

JOHN W. WITT, City Attorney

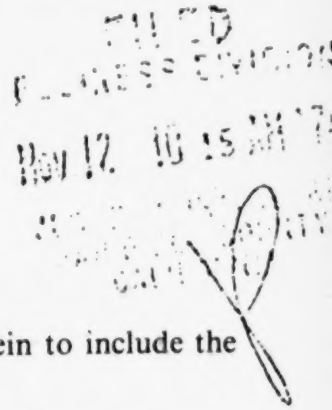
By /s/
Ronald L. Johnson
Chief Deputy

EXHIBIT E

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation, et al., Defendants.	No. 357022 AMENDMENT TO COMPLAINT [DECLARATORY RELIEF]



Plaintiff hereby amends its Complaint on file herein to include the following cause of action. Plaintiff alleges:

FOURTH CAUSE OF ACTION

[Declaratory Relief, C.C.P. §1060]

I

Plaintiff repeats and realleges each, every and all of the allegations contained in Paragraphs I through XVI, inclusive, of Plaintiff's First Cause of Action, and incorporates the same herein as though fully set forth.

II

The ordinances purportedly adopted by the defendant, CITY OF SAN DIEGO, were invalid and unconstitutional and byond the power of said defendant in that:

a. Said ordinances were adopted without notice to plaintiff as required by the Constitution of the United States of American and California, causing substantial prejudice to plaintiff;

b. Said ordinances were arbitrary, capricious, oppressive, unreasonable and an unreasonable exercise of the purported police power of the City of San Diego.

III

A controversy has arisen between plaintiff and defendants, and each of them, in that plaintiff claims the ordinances adopted by defendant CITY OF SAN DIEGO are unconstitutional and void and defendants claim said ordinances are valid and enforceable against the plaintiff.

IV

Plaintiff desires and requires a judicial determination of its rights and duties in the circumstances, and a declaration of the Court that the ordinances adopting the proposed open space element to the City's General Plan and the ordinance down-zoning that portion of the subject property herein referred to as parcel A are void and unconstitutional.

WHEREFORE, plaintiff prays for judgment against defendants and each of them as follows:

1. For a declaration of this Court that the ordinance down-zoning that portion of the subject property herein referred to as parcel A is unconstitutional and void.

2. For a declaration of this Court that the ordinance adopting that portion of the open-space element of San Diego's General Plan applicable to the subject property is unconstitutional and void.

3. For an injunction permanently enjoining the defendants and any officer or agent of any of them, from attempting to enforce said

3. For an injunction permanently enjoining the defendants and any officer or agent of any of them, from attempting to enforce said ordinances against plaintiff.

4. For such other and further relief as the Court may deem proper.

DATED: November 8, 1974

Gordon Pearce
C. Edward Gibson
LUCE, FORWARD, HAMILTON
& SCRIPPS

By /s/
Louis E. Goebel, Attorneys
for Plaintiff SAN DIEGO GAS
& ELECTRIC COMPANY

FILED
Robert D. Zumwalt, Clerk
APR 9 1976
BY S. KENDALL, Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation, et al., Defendants.	NO. 357022 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on January 19, 1976, in Department 26 of the above-entitled Court, the Honorable Jack R. Levitt, Judge, presiding, Louis E. Goebel appeared as counsel for plaintiff, San Diego Gas & Electric Company, and C. Alan Sumption appeared as counsel for defendant, City of San Diego, a municipal corporation.

The matter having been previously bifurcated to require trial of the question of liability first and a jury having been demanded by plaintiff, the Court heard argument and received briefs on the question of entitlement of plaintiff to a jury in the liability phase of the trial. The matter was submitted to the Court for decision, and the Court determined that the plaintiff was not entitled to a jury in the liability phase, but was entitled to a jury for the damage phase.

The liability phase proceeded without a jury. Witnesses were sworn and evidence, both oral and documentary, was introduced. The evidence in the liability phase being closed, and the question of liability having been submitted to the Court for decision, and, after deliberation thereon, the Court now renders its decision in writing and makes the following Findings of Fact and Conclusions of Law on the question of liability:

FINDINGS OF FACT

1. Plaintiff San Diego Gas & Electric Company is a corporation with its principal place of business in San Diego County, California, and is the legal owner of the real property which is the subject of this action.

2. The defendant City of San Diego is a municipal corporation possessing the power of eminent domain.

3. In April of 1966, plaintiff acquired approximately 412 acres of property in the Sorrento Valley area of the City of San Diego as an assemblage after extensive negotiation. The portion of this property located south of Carmel Valley Road and west of Interstate 5 is the subject of this action and is the property acquired by plaintiff in April of 1966, except that portion east of Sorrento Valley Road and the 12 acres west of the railroad right of way and which is graphically described in Exhibit "A", attached hereto and made a part hereof by this reference.

4. Approximately 25 acres of the subject property was acquired from the defendant City at fair market value of approximately $5,200 per acre.

5. The northwesterly portion of the subject property is subject to tidal action from the Pacific Ocean and is sometimes referred to as the

Los Penasquitos Lagoon. A great portion of the subject property is not subject to tidal action nor salt water intrusion, although it is subject to fresh water ponding in the wet season. There exists only sparse vegetation on the property. It is presently and has been since 1966 vacant except for some utility lines which traverse it.

6. In 1966, approximately 116 acres of the subject property was zoned M-1-A (industrial), and most of the balance was zoned A-1-1 (agricultural holding).

7. The General Plan of the City of San Diego, first adopted in 1967, designated almost all of the subject property for industrial use, and this designation has been reaffirmed consistently with the last readoption in January of 1972.

8. In 1966, considerable industrial development had taken place in the Sorrento Valley area immediately to the southeast of the subject property, and this development continued apace through 1973 and to the present so that the industrial development is substantially filled out up to the subject property.

9. In the late 1960's, a proposed plan of lands in the City which might be acquired for open space was prepared by the Planning Department of the defendant City, and a portion of the subject property was included therein.

10. On March 16, 1972, a conference meeting of the San Diego City Council was held on the subject of open space. Particular reference was made to the acquisition of open space and a bond issue was discussed. A motion was passed directing the Planning Director and the City Attorney to proceed to determine a schedule of those open space areas which they felt they could proceed to rezone.

11. In July of 1972, the City Council held another conference on the subject of open space and specifically discussed an open space bond issue for the November, 1972, election.

12. On August 10, 1972, the City Council of the defendant City initiated a rezoning of the subject property from M-1-A to A-1-10, or other appropriate zone.

13. The open space bond issue on the November, 1972, ballot failed.

14. In late 1972 or very early in 1973, the Planning Department of the defendant City commenced preparing an open space element to the City's General Plan as required to be adopted by State law by June 30, 1973. The draft open space element designated a portion of the subject property which was then zoned M-1-A as open space for public acquisition.

15. At the same time, the Community Development Department of the defendant City was carrying out detailed planning for the funding of open space acquisition, and specific estimated costs of acquisition of specific properties were being estimated. This effort was in preparation for another open space bond issue scheduled for the September, 1973, municipal election. One estimate reported was the acquisition of 120 acres of the subject property for a cost of $900,000.00.

16. On April 17, 1973, the City Council of the defendant City adopted a resolution of public convenience and necessity regarding the acquisition of park reserve areas. This resolution did not contain descriptions of specific properties, but referred to a 22.5 million dollar bond issue being proposed for the September, 1973, municipal election. Subsequently, the publicity for this bond issue identified the subject property as one of the properties to be acquired, and

newspaper articles appeared prior to the election with maps showing the outlines of the subject property and indicating its acquisition.

17. On April 11, 1973, the Planning Commission of the defendant City held a public hearing on the proposed rezoning of the subject property, and the Planning Commission recommended down-zoning of a portion of the subject property, approximately 39 acres, from M-1-A to A-1-10, but recommended that a substantial portion, approximately 77 acres, remain M-1-A, and that a further segment, approximately 50 acres, remain A-1-1, but be considered for future industrial use on submission of a specific plan for development.

18. On May 16, 1973, the Planning Commission of the defendant City held its first public hearing on the new open space element to the City's General Plan which was entitled, "A Plan for the Preservation of Natural Parks for San Diego". Plaintiff and others had only received the proposed plan less than 24 hours before the hearing, and, accordingly, a continuance was requested and ultimately granted to May 23, 1973. The plan as submitted proposed to designate only the northerly portion of the subject property as open space.

19. At the May 16, 1973, hearing, M. David Smith of the Planning Department, and James McLaughlin of the Community Development Department, compared notes and determined that the plan proposed by the Planning Department did not conform to the plans being developed in the Community Development Department for use in conjunction with the bond issue. Mr. Smith had been previously instructed by his superiors to conform the Planning Department's open space efforts to those of the Community Development Department. Accordingly, Mr. Smith directed his associate, Mr. Stang, to coordinate with the Community Development Department and to make the open space element designations conform to those of the Community Development Department for acquisition by bond issue.

Mr. Stang did so and revised the large wall exhibit maps which were on display at the Planning Commission hearing. The effect of the revision as to the subject property was to include all of the subject property except that east of Sorrento Valley Road and the 12 acres west of the railroad right of way. However, there was not sufficient time before the next hearing to reprint the maps contained in each report which had been submitted to the Planning Commission and to the public. Accordingly, they were left in their existing form.

20. On May 23, 1973, the continued hearing on the open space element was held before the Planning Commission. No mention was made on the public record that the wall exhibits had been altered, and plaintiff was totally unaware that the change had been made and of its impact with respect to the subject property. The open space element was adopted by the Planning Commission in the form presented.

21. On May 30, 1973, the City Council of the defendant City held another Council conference and received the report from the Community Development Department regarding the bond issue. The efforts of the Community Development Department had culminated in a report entitled, "Staff Report, Park Reserve Systems, April 29, 1973". This report discussed the means of funding acquisition of property for open space and specifically designated substantially all of the subject property for acquisition as open space.

22. On June 7, 1973, the City Council of the defendant City accepted the recommendation of the Planning Commission and thereafter rezoned a portion of the subject property from M-1-A to A-1-10, while retaining a substantial portion in the M-1-A zone and further retaining a portion of the A-1-1 zone with a recommendation for consideration for future industrial upon submission of a specific plan for development.

23. On June 19, 1973, the City Council of the defendant City held a public hearing for adoption of the open space element to the City's General Plan. Again, individual revised maps were not prepared nor distributed. Rather, the corrected wall exhibits were displayed. The copies of the open space element which each member of the City Council and members of the public held contained the erroneous map designation. No mention of this discrepancy was made on the public record, and the open space element was adopted as presented.

24. Plans were finalized for inclusion of an open space bond issue on the September 18, 1973, municipal election ballot. During the campaign leading up to this election, various presentations and publicity depicted the subject property as property to be acquired for public use by designating it on various graphic representations utilized.

25. The September 18, 1973, bond issue failed.

26. Following the September, 1973, election, the defendant City deleted the subject property from its priority list of proposed open space acquisitions.

27. In the condition that existed prior to June of 1973, the highest and best use of the property taken was for use as an industrial park and related buffer areas.

28. In the aforesaid condition, before the actions of the defendant City in June of 1973, the property had a substantial fair market value.

29. The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has

further suffered severance damage with respect to the balance of the subject property.

30. No development could proceed on the property designated as open space unless it was consistent with open space. In light of the particular characteristics of the said property, there exists no practical, beneficial or economic use of the said property designated as open space which is consistent with open space.

31. Since June 19, 1973, the property designated as open space has been devoted to use by the public as open space.

32. Following the actions of the defendant City in June of 1973, it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space or the remainder of the subject property.

33. Since the actions of the defendant City in June of 1973, the property designated as open space and the remainder of the larger parcel is unmarketable in that no other person would be willing to purchase the property, and the property has at most a nominal fair market value.

CONCLUSIONS OF LAW

1. The actions of defendant City against plaintiff's property were motivated to achieve a public purpose, namely, preservation of open space, without payment of just compensation and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just

compensation within the meaning of the California and United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property.

2. Plaintiff is entitled to judgment against defendant City of San Diego for money damages in an amount to be determined by the fair market value of the property designated as open space on June 19, 1973, considered without regard to the open space designation, together with damages to the remainder parcel or parcels, together with plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal and engineering fees actually incurred.

TRIAL

The trial of the damage phase of this action before a jury is hereby set for May 3, 1976, at 10:00 a.m., in Department 26, San Diego County Superior Court.

DATED: APR 9 1976.

JACK R. LEVITT

JUDGE OF THE SUPERIOR COURT

LAW OFFICES
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 THE BANK OF CALIFORNIA PLAZA
110 WEST A STREET
SAN DIEGO, CALIFORNIA 92101
(714) 236-1414

FILED
Robert D. Zumwalt, Clerk
OCT 8 1976
BY J. KENDALL, Deputy

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation, et al., Defendants.	No. 357022 JUDGMENT IN INVERSE CONDEMNATION

This cause came on regularly to trial on January 19, 1976, in Department 26 of the above-entitled court, the Honorable Jack R. Levitt, Judge, presiding, Louis E. Goebel appeared as counsel for plaintiff SAN DIEGO GAS & ELECTRIC COMPANY, and C. Alan Sumption appeared as counsel for defendant CITY OF SAN DIEGO, a municipal corporation.

The matter had been previously bifurcated to require the question of liability to be tried to the court and the issue of just compensation being thereafter determined by the jury.

Findings of Fact and Conclusions of Law were executed and filed herein which provided, *inter alia*, that the activities of defendant CITY with respect to plaintiff's property constituted a taking of that portion of plaintiff's property described on Exhibit A attached hereto and made a part hereof by this reference, and that plaintiff was entitled to damages in the amount of the fair market value of the property taken as of June 19, 1973, and damages to the remaining lands of plaintiff.

The court having instructed the jury as to the law of the case, submitted to the jury a form of verdict and instructed the jury to ascertain and assess the fair market value of the subject property as of June 19, 1973, as their verdict in said cause. The jury retired and did consider said matter and thereafter returned into court for their verdict in said action and returned said form of verdict so submitted to them, which verdict was as follows:

> "We, the jury in the above-entitled action, find that,
>
> 1. The fair market value of the property taken is $2,886,300.00.
>
> 2. The severance damages to the remainder of plaintiff's property after acquisition are $283,696.00."

Said verdict was then and there, on May 20, 1976, duly entered and filed, and the court having made its Findings of Fact and Conclusions of Law as to all other matters, questions and issues involved in the proceeding;

And it further appearing to the court that the use to which the property was taken and is to be applied is a use authorized by law, and that the taking of the same is necessary to such use; and that the taking of the property occurred on June 19, 1973;

NOW, THEREFORE, by reason of the law in the premises and the evidence of the verdict aforesaid,

IT IS HEREBY ORDERED AND ADJUDGED that the value of plaintiff's real property taken by defendant, as fixed by the jury, was on June 19, 1973, the sum of $2,886,300.00, together with damages to the remainder of plaintiff's property, after severing from said property the part taken, in the amount of $283,696.00, for the total amount of $3,169,996.00;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff is entitled to and does hereby recover interest on said amount of $3,169,996.00 at the legal rate of seven percent (7%) per annum from and after June 19, 1973 to the date of entry of judgment;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff is entitled to and does hereby recover its appraisal fees in the amount of $41,094.53; its engineering fees in the amount of $41,779.54; and its attorneys' fees in the amount of $39,685.00;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff recover its costs of suit herein;

IT IS FURTHER ORDERED AND ADJUDGED that payment to the court of the sum of money specified above is in full payment for the real property so taken, and for damage to the remaining lands of plaintiff suffered by reason of the taking of the property;

IT IS FURTHER ORDERED AND ADJUDGED that the real property taken is described more particularly on Exhibit A attached hereto and incorporated herein by this reference.

DATED: OCT 8 1976

JACK R. LEVITT

JUDGE OF THE SUPERIOR COURT

SAN DIEGO GAS & ELECTRIC COM
PANY, Plaintiff and Respondent,

v.

CITY OF SAN DIEGO et al.,
Defendants and Appellants.

Civ. 16277.

Court of Appeal, Fourth District,
Division 1.

May 17, 1978.

As Modified on Denial of Rehearing
June 13, 1978.

Hearing Granted July 13, 1978.

Electric utility sued city in inverse condemnation to recover value of property allegedly taken because down zoning combined with inclusion of tract in open space element of general plan made it impossible to use the land. The Superior Court, San Diego County, Jack R. Levitt, J., rendered judgment for the utility, and the city appealed. The Court of Appeal, Gerald Brown, P.J., held that: (1) subject to exceptions, general rule is that a rezoning which merely reduces market value does not give rise to a cause of action in inverse condemnation; (2) although charter city, which did not adopt implementing ordinances, was not bound by statute requiring zoning to be consistent with general plan, city's policy of "consistency" could be considered; (3) where combination of down zoning plus inclusion of property in open space element, plus "consistency" policy and city's overtures to purchase the property for open space deprived owner of beneficial use thereof, in that because of location and peculiar characteristics of the land it was suitable only for industrial use, which city would not permit, and had no beneficial or economic use except as open space, a compensable taking had occurred; (4) failure to apply for conditional use permit did not bar relief on theory of failure to exhaust administrative remedies since owner was not seeking to develop the land, and (5) award of prejudgment interest was not error.

Affirmed.

GERALD BROWN, Presiding Justice.

The City of San Diego (City) appeals the judgment after the court found it had inversely condemned property owned by San Diego Gas & Electric Company (Company) which the jury valued at $2,886,300. Additionally, the jury found $283,696 severance damages. The court ordered interest of 7% to be paid on the total, $3,169,996, from the date of taking,

June 19, 1973, plus appraisal, engineering and attorneys' fees totaling $122,559.07.

The property is in Sorrento Valley in the northern part of the City, in the southwest quadrant of the intersection of Highway I-5 and Carmel Valley Road between I-5 and the Torrey Pines State Park; it is generally at low elevation, is a drainage basin, tidal basin or flood plain and is subject to standing water or "ponding"; part is subject to ocean tidal action and portions have been referred to as the Los Penasquitos Lagoon, an estuary and wildlife refuge; a portion is within the State Coastal Act zone.

Company assembled the approximately 412-acre parcel in 1966 and then discussed with City its plan to hold the land for possible future construction of a power plant. In 1972 City initiated rezoning hearings for the property which was then zoned industrial (M-1A zone) and agricultural or holding zone (A-1-1); at that time the City General Plan Map designated most of the property as industrial and the remainder as "area for future growth." At the same time, the City Planning Department was preparing an open space plan for the city which ultimately was entitled "A Plan for the Preservation of Natural Parks for San Diego" and included about 230 acres of Company's land. In addition, in early 1973, the Community Development Department prepared a staff report entitled "Park Reserve Systems," which discussed the financing and acquisition of park reserve lands and got estimated values for the proposed park properties, including the property in question here, as part of a bond proposal to be put before the electorate in September 1973.

The City Council, on June 7, 1973, down-zoned some of the land from industrial to A-1-10 and part of the A-1-1 land was designated for future industrial development; the rest of the land in the industrial zone retained its industrial classification.[1] On June 19, 1973 City adopted the open space element of the General Plan which covered all the land found condemned here, about 233 acres. In September 1973, the report of the Community Development Department was received and this property appeared on maps as one of the properties to be acquired if the bond issue passed. It failed. A year later Company filed suit.

The City claims its acts in zoning the property for light industry and agriculture with an open space general plan designation do not constitute a taking or a damaging of property. Company claims City has inversely condemned its land because the zoning regulations

1. From 1966-1973 the property was zoned:

Industrial (M-1A)	116 acres
Agricultural (A-1-1)	112 acres
" holding zone	

After the rezoning, the land was classed as:

Industrial (M-1A)	77 acres
Agricultural (A-1-10)	39 acres
" holding zone (A-1-1) with 50 acres to be considered for future industrial use.	112 acres

combined with the open space element of the general plan has made the property useless. Substantial evidence, introduced during trial, supports the Company's position.

[1] The power of eminent domain is the state's inherent power to take private property for public use (*Rose v. State of California,* 19 Cal.2d 713, 719, 123 P.2d 505). However, the state is limited in exercising this power by Article I, section 19 of the California Constitution which assures the private landowner he will be compensated if his land is taken or damaged.

[2] In some instances the state will appropriate a person's property without paying for it in advance. This may occur in a variety of situations. The government may deliberately destroy private property in the public interest such as when it demolishes buildings to prevent the spread of fire; it may inadvertently damage property in the construction of public improvements; it may decrease the value of a person's property, for example, by constructing a freeway which cuts down light and air to a particular property; or it may decrease the value of a person's property by regulations which limit the use or development of the property. (10 Cal.Law Rev. Commission Reports, Recommendations and Studies, 1970-1971 at pp. 79-81.) In these instances the state is said to have acquired the property through inverse condemnation and the property owner can bring suit to recover the compensation due him.

[3-8] The state derives its authority to zone property from the police power, the government's power to enact regulations to protect the health, safety and welfare of its citizens. Unlike the person whose property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation (*Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515, 530, 20 Cal.Rptr. 638, 370 P.2d 342). In California the general rule is that a rezoning which reduces the market value of the land does not give rise to a cause of action in inverse condemnation (*HFH, Ltd. v. Superior Court,* 15 Cal.3d 508, 514, 125 Cal.Rptr. 365, 542 P.2d 237). However, there are exceptions to the rule. For example, the state may abuse its use of the police power by placing unreasonable or arbitrary regulations on land under the guise of zoning (*Pinheiro v. County of Marin,* 60 Cal.App.3d 323, 326, 131 Cal.Rptr. 633). A regulation may be unreasonable if it deprives the landowner of any beneficial use of his property (*Eldridge v. City of Palo Alto,* 57 Cal.App.3d 613, 624, 129 Cal.Rptr. 575) or if it deprives the owner of his property so it can be used by the public (*Sneed v. County of Riverside,* 218 Cal.App.2d 205, 32 Cal.Rptr. 318). Likewise, if the state down-zones a property to decrease its value as a prelude to later acquiring the property, the zoning may be found to have been a condemnation. Or, if zoning classifications are used to evade the requirement that land used by the public must be acquired by the public, such zoning is condemnation (*HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, 516, fn. 14, 520, 125 Cal.Rptr. 365, 542 P.2d 237). The question whether a particular zoning restriction results in a

taking by inverse condemnation is "a question of fact to be determined by trial of the issue." (*Eldridge v. City of Palo Alto, supra,* 57 Cal.App.3d 613, 628, 129 Cal.Rptr. 575, 584.) On review, the appellate court looks for substantial evidence to support the finding below (*Foreman & Clark Corp. v. Fallon,* 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362).

[9-11] When the government restricts a landowner's use of his property, it is important to determine whether it is doing so under the police power or under the power of eminent domain because this is what governs the question of compensation. However, there is no set formula to distinguish a regulation from a taking or to draw the line where regulation ends and taking begins. Cases which involve the appropriation of land by the state or use of the land by the public clearly demand the state to take title and pay for the taking; cases where the landowner is prohibited from noxious use of his land, for example as a gravel pit,[2] no compensation is due even though the landowner may be effectively prevented from all use of his land. From another point of view, where the government acts in its enterprise capacity, acquiring assets from the citizenry for its own account, as it were, then payment must be made; where the government mediates disputes among competing alternatives, such as prohibiting pigs in the backyard, it is merely regulating the private interests in the community. One commentator has suggested that the compensation clause in the Constitution never was meant to preserve the economic status quo; rather, it is to serve as a curb on arbitrary government action (Sax, *Takings and the Police Power,* 74 Yale L.J., 36, 37-40, 58, 62-63). However, these guidelines are not always of great help in answering whether a governmental action is a regulation or a taking.

[12] Stripped to its bare essentials, we are asked here whether a person with land zoned for agriculture and manufacturing but lying within the open space area of the general plan can be denied all use of his land and denied compensation. Recognizing that a downzoning, as long as it is reasonable, is not a basis for inverse condemnation, what effect does the general plan have?

[13, 14] Zoning and the general plan are closely interrelated because they both deal with land use, but each performs an essentially different function. Zoning is very precise and legally restricts present land use, while the general plan is merely a planning document which is to serve as a guide to future land use. In California general plans are mandatory (Gov.Code § 65300 et seq.); provision is made for their amendment three times a year (Gov.Code § 65361) which highlights the fact that they are not final documents--neither completed nor inflexible. San Diego's General Plan states in the legend:

> "NOTE: this map presents General Plan land use and circulation policies and proposals in a generalized,

2. *Consolidated Rock Products Co. v. City of Los Angeles, supra,* 57 Cal.2d 515, 518, 20 Cal.Rptr. 638, 370 P.2d 342.

graphic form. It is not a zoning map and should not be so construed."

Notwithstanding the differences in their purpose, scope and function, zoning and the general plan become inextricably linked by the passage of AB 1301 which mandates that zoning be consistent with the general plan (Gov.Code § 65860). At the same time, laws were passed requiring that the issuance of building permits, approval of subdivision maps and adoption of open space zoning be dependent on the proposal being consistent with the local open-space element (Gov.Code § 65567). Depending on the jurisdiction's definition of open space, it would be possible for a parcel within the open space element to be zoned light manufacturing as is the case here and still be consistent with the general plan.[3] However, the issue here should be moot since these provisions requiring consistency do not apply to charter cities such as San Diego unless the City has adopted similar ordinances. This the City has not done (Gov.Code §§ 65700, 65803; *Dale v. City of Mountain View*, 55 Cal.App.3d 101, 108, fn. 5, 127 Cal.Rptr. 520). Thus, here, the general plan should be merely a planning document and should not legally bind the City in making land use decisions.

[15-17] Because the general plan lacks definiteness and finality, there can be no claim in inverse condemnation because land falls within a certain category on an adopted plan (*Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 119-120, 109 Cal.Rptr. 799, 514 P.2d 111). The mere "planning in anticipation of a public improvement is not a taking" (*Hilltop Properties v. State of California*, 233 Cal.App.2d 349, 356, 43 Cal.Rtpr. 605, 609). Even an announcement that an agency intends to condemn a property results in a taking only when a city does some unequivocal act which shows it is proceeding with a planned improvement (*Hilltop Properties v. State of California, supra*, 233 Cal.App.2d 349, 356, 43 Cal.Rptr. 605). However, even if a bond issue is proposed and certain properties are singled out for purchase if the bond issue passes, this is not a sufficiently unequivocal act to give rise to an action in inverse condemnation (see *City of*

3. The City's definition of open space makes it less than likely a manufacturing zone would be found consistent with open space. On the general plan "open space" is: "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

Municipal Code section 61.0601 defines open space as: "any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which, in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the 'Progress Guide and General Plan for The City of San Diego' as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

Walnut Creek v. Leadership Housing Systems, 73 Cal.App.3d 641, 622, 140 Cal.Rptr. 690).

[18-20] In summary, the act of downzoning is not compensable unless the regulation is unreasonable or an attempt by the government to lower the value of the land before buying it. Adoption of a general plan does not result in condemnation unless there are additional specific acts which commit the governmental agency to purchase the property. Here there is no legal requirement that the zoning be consistent with the general plan. However, a review of the record shows this was an underlying premise in the court below: expert witnesses testified there must be consistency between zoning and the general plan; counsel for the parties agreed this was the way things were done; City brings to our attention in its briefs the fact it is exempt from the consistency provisions but does not follow through to conclude that the court below made its decision under improper law.[4] As a charter city, San Diego is exempt from the requirements that building permits, subdivision maps and its acquisition and disposal of land be consistent with the open space plan unless the City adopts ordinances to that effect (Gov.Code §§ 65566, 65567, 65700). Even though the City has not adopted the necessary statutes, the City's Planning Department includes these requirements in its publication "A Plan for the Preservation of Natural Parks for San Diego." It appears the City vascillates on this question and thus has the opportunity to deny projects on the basis of inconsistency with the general plan and to deny inverse condemnation because it is not legally bound to have consistency. Although the City weakly protests in its briefs, from the record presented to this court it is clear that even though City may not have been legally bound to have its zoning consistent with its general plan, the City follows this procedure as a matter of policy. The fact that land is within the open space element and its zoning and use are subject to open space constraints, does not constitute inverse condemnation as a matter of law. As noted earlier, the determination there has been inverse condemnation through excessive regulation is a factual matter and we look for substantial evidence to support the finding.

[21, 22] The appellate court presumes the judgment is correct (*Denham v. Superior Court,* 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193) and resolves conflicts in the evidence in support of the judgment (*Nestle v. City of Santa Monica,* 6 Cal.3d 920, 925-926, 101 Cal. Rptr. 568, 496 P.2d 480). Here, the trial court found:

> "Due to the continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has further suffered severance damage

4. Rather, City somewhat inconsistently argues there was no condemnation here because no zoning classification is inconsistent *per se* with open space.

with respect to the balance of the subject property.

"No development could proceed on the property designated as open space unless it was consistent with open space. In light of the particular characteristics of the . . . property, there exists no practical, beneficial or economic use of the . . . property designated as open space which is consistent with open space."

The City has not denied Company a permit to develop the land. Rather Company presented expert witnesses who testified the land could not be used for agriculture because of the soil's high salt content; it could not be used for residences because the land is in a flood plan; it could not be used economically for grazing; it could not be used for a golf course because of poor drainage. In short, the only possible use of the land was for industrial. But, there was testimony by experts that City required zoning to be consistent with the general plan; the City's definitions of open space (see fn. 3) give rise to the inference that industrial use would not be permitted in the open space area; the City's own expert testified he had never seen an industrial development that would be consistent with oper space although he did not rule out the possibility entirely.[5] The clear inference is that City would deny any application for industrial development on this parcel because of the open space designation on the general plan. In addition, there was expert testimony that after the open space element was adopted, the land had no economic use and no one would buy it. This was substantial evidence to support the court's conclusion there was inverse condemnation.

[23-25] City claims Company is not entitled to relief because it did not try to get a conditional use permit nor did it establish that City would not grant a rezoning or amend the general plan. Both City and its amicus curiae say this as a failure on Company's part to exhaust its administrative remedies, a necessary prelude for the court to acquire jurisdiction (*Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942). Company here was trying to enjoin City from enforcing the zoning applicable to its property (see *Metcalf v. County of Los Angeles*, 24 Cal.2d 267, 268, 148 P.2d 645; *Banville v. County of Los Angeles*, 180 Cal.App.2d 563, 565, 4 Cal.Rptr. 458); or recover damages in inverse condemnation for a taking of its property. (See *Sneed v. County of Riverside*, 218 Cal.App.2d 205, 212, 32 Cal.Rptr. 318.) As to inverse condemnation we know of no administrative agency that handles such suits; this is a matter for the courts. As to these counts, there was no failure to exhaust any administrative remedy since none existed (see *Ramos v. County of Madera*, 4 Cal.3d 685, 691, 94 Cal.Rptr. 421, 484 P.2d 93). If the ordinance is allegedly

5. City's expert witness testified that a project would not be denied only because it was located within the open space zone and opined that a design for industrial use of the property could be consistent with open space although he concluded "I haven't seen one, but I think that that's possible."

void, then it is necessary to exhaust administrative remedies by seeking a variance or amendment unless it would be futile to do so (*Ogo Associates v. City of Torrance*, 37 Cal.App.3d 830, 834, 112 Cal.Rptr. 761). The trial court said the facts here were within the exception: the land was to be acquired for open space, had been appraised and had been on the ballot for purchase; the site was included as a park in the City's plan for acquiring parks; the land because of its peculiar characteristics is not suitable for any use, and, thus, any zoning other than industrial. It is inconceivable the City would grant an amendment to the general plan when it had always intended this land would be open space, the very reason it was classified as open space. It is irrelevant whether the City would change the zoning to industrial, the only possible use of the land, in light of the substantial evidence City would not permit industrial development here. It would have been futile to seek administrative review and was unnecessary for Company to exhaust its administrative remedies in this regard.

[26, 27] City says if its acts constitute a taking, Company is not entitled to money damages but only to have the offensive regulations set aside. It contends damages are inappropriate because there has been no actual use of the land by the public and, in essence, Company has not sustained any damage.

The proper remedy depends on what acts of the City are challenged and the findings of the trial court. If the City has acted arbitrarily or discriminatorily in passing the ordinance in question, the landowner should use administrative mandate to have the ordinance changed (*HFH, Ltd. v. Superior Court, supra*, 15 Cal.3d 508, 516 fn. 13, 125 Cal.Rptr. 365, 542 P.2d 237); if the City has enacted an unconstitutional or invalid zoning ordinance, the landowner may seek mandate, injunctive relief or declaratory relief (*Pinheiro v. County of Marin, supra*, 60 Cal.App.3d 323, 326, fn. 2, 131 Cal.Rptr. 633) and the governmental agency is immune from any tort liability (Gov.Code § 818.2; *State of California v. Superior Court (Veta)*, 12 Cal.3d 237, 245-247, 115 Cal.Rptr. 497, 524 P.2d 1281); if the zoning is valid but so harsh that it deprives the owner of all beneficial use of its land, there has been a condemnation and damages are proper (see *Eldridge v. City of Palo Alto, supra*, 57 Cal.App.3d 613, 618, 129 Cal.Rptr. 575).

Here Company claimed in one count that the zoning ordinance or the open space element was unconstitutional and void. But it never presented any evidence notice was improper or the ordinance was arbitrary. Rather, the evidence showed and the trial court found that the combination of the zoning on the property plus its inclusion in the open space element plus the City's policy of requiring consistency between zoning and the general plan plus City's overtures to purchase the land for open space had deprived it of the beneficial use of its land. The trial court so found. This is an example of inverse condemnation and the landowner should, under the Constitution, be compensated.

[28] City says that if there was a taking and if compensation is due, the trial court erred in awarding interest from the date of the taking rather than from the date of

judgment. Code of Civil Procedure section 1255b, cited by the City, and in effect at the time suit was commenced,[6] provides in part:

"(a) The compensation and damages awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

"(1) The date of the entry of judgment.

"(2) The date that the possession of the property sought to be condemned is taken or the damage thereto occurs.

"(3) The date after which the plaintiff may take possession of the property as stated in an order authorizing the plaintiff to take possession."

However, former section 1255b deals with eminent domain proceedings and is not applicable here (see *Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal.3d 648, 658, fn. 11, 131 Cal.Rptr. 646, 552 P.2d 430).

[29] City says interest should be paid from the time of judgment because no one has interfered with Company's use of the property nor has there been any actual damage to the property. However, in *Holtz* it was the Transit District's removal of lateral support on adjoining property that caused structural damage to improvements on Holtz's land. The Transit District suggested there should be no prejudgment interest because Holtz was not deprived of the use of his property even though repairs were necessary. The Supreme Court responded:

"The contention that an actual taking or dispossession is required in order to justify prejudgment interest in every case lacks merit. The right to prejudgment interest in inverse condemnation accrues *as of the date the compensable taking or injury occurred without regard to the nature or scope of the compensable event.*" (Emphasis ours; *Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal.3d 648, 657, 131 Cal.Rptr. 646, 653, 552 P.2d 430, 437.)

Here Company's land became the subject of inverse condemnation when the open space element was adopted and, in turn, triggered City's policy of not allowing development of the property. There was no error in awarding prejudgment interest.

[30] City's amicus curiae, the Attorney General, is correct in saying the City's efforts to acquire Company's project by raising the money through a bond issue do not constitute precondemnation blight (see *City of Walnut Creek v. Leadership Housing Systems, supra*, 73 Cal.App.3d 611, 622, 140 Cal.Rptr. 690).

[31] City claims the trial court erred in allowing severance damages because there was no unity of use and no physical contiguity between the condemned and severed portions. Here the condemned parcel was physically separated by a road from other pieces of the Company's land: one was leased by Company and not

6. Section 1255b of the Code of Civil Procedure was repealed effective July 1, 1976 and its provisions are now contained in Code of Civil Procedure section 1268.310. Under Code of Civil Procedure section 1230.065 section 1255b would be used here.

owned in fee and the jury, in a special finding, did not award any damages due to its severance; the other parcel was suitable for industrial development and was zoned just like the piece across the street. However, the fact the two parcels were separated by a road is immaterial as long as there is access between them and the use of the land taken is not dissimilar to that of the remainder (*City of Los Angeles v. Wolfe*, 6 Cal.3d 326, 330, 99 Cal.Rptr. 21, 491 P.2d 813). Here there was testimony the area deemed feasible for industrial development included the remainder parcel. There was no error in awarding severance damages.

[32] City argues the trial court erred when it admitted into evidence how much Company had paid for the land originally. Here there was a bifurcated trial with the court determining liability and the jury damages. In order to establish liability, Company had to show that one of its property rights had been invaded and this had directly caused injury (*Selby Realty Co. v. City of San Buenaventura, supra*, 10 Cal.3d 110, 119-129, 109 Cal.Rptr. 799, 514 P.2d 111). City contends correctly the purchase price of the land is irrelevant because a diminution in the value of the land due to a change in zoning does not result in a taking. However, it is relevant to prove the Company suffered injury. This was not error.

[33] City claims the trial court erred in admitting into evidence the testimony of two expert witnesses, each of whom said he would not have advised Company to apply for an industrial development permit because to do so would have been a waste of time and money. However, this testimony was not admitted for the purpose of showing whether City would approve or deny development; rather it was admitted to explain why Company had not tried to get a permit. This was relevant and its admission was not reversible error.

[34-36] City claims the court erred in compelling City Councilman Floyd Morrow to answer hypothetical questions at an oral deposition. The questions related to Morrow's interpretation as an expert witness of "consistency" with the general plan[7] and potential use of the subject property. City is concerned

7. In substance the three questions were:

1) In your opinion as a land use control expert, may a development plan for the subject property be denied by the City of San Diego on the sole ground that the subject property has been designated as open-space for public acquisition in the open-space element of the City's General Plan?

2) In your opinion, pursuant to Government Code § 65567, may a building permit or subdivision map be properly denied for the sole reason that the use contemplated by the permit or map is not consistent with the open-space element of the General Plan of the City?

3) In your opinion, following the City's adoption of the open-space element of the General Plan in June 1973 were there any practical, beneficial or economic uses to which the subject property could have thereafter been devoted? If so, what?

because Mr. Gallagher, an expert appraiser, relied in part on Morrow's deposition in arriving at his conclusion that the highest and best use of the property was public open space. However, City failed at the trial level to preserve this issue for appeal because it did not object to or move to strike Gallagher's testimony insofar as he relied on Morrow's deposition (see *Bardessono v. Michels*, 3 Cal.3d 780, 794, 91 Cal.Rptr. 760, 478 P.2d 480). Notwithstanding City's failure to object, the questions asked were relevant to a determination of the highest and best use of the property. It is proper to discover an expert's opinion through depositions using hypothetical questions (*Dow Chemical Co. v. Superior Court*, 2 Cal.App.3d 1, 10, 82 Cal.Rptr. 288; *Zelayeta v. Pacific Greyhound Lines*, 104 Cal.App.2d 716, 724, 232 P.2d 572). The questions posed to Morrow asked for his opinion as an expert and did not seek to trace his thought processes or motives in passing some particular piece of legislation; the argument this material was not discoverable because of a legislator's privilege is misplaced (*County of Los Angeles v. Superior Court (Burroughs)*, 13 Cal.3d 721, 730-731, 119 Cal.Rptr. 631, 532 P.2d 495). Even if the order compelling answers were improper the resulting prejudice was not sufficient to cause reversible error. The answers in the deposition were only one source of information used by Gallagher in coming to his opinion; he also relied on publications put out by City, opinions of attorneys who were experts in land use matters, his personal experience in appraising other open space property and interviews with potential purchasers and developers. The trial court had the necessary information to be able to assess how much weight to give to Gallagher's testimony.

[37] City complains there is no evidence to support findings 16 and 24 which state:

"16. On April 17, 1973, the City Council of the defendant City adopted a resolution of public convenience and necessity regarding the acquisition of park reserve areas. This resolution did not contain descriptions of specific properties, but referred to a 22.5 million dollar bond issue being proposed for the September, 1973, municipal election. Subsequently, the publicity for this bond issue identified the subject property as one of the properties to be acquired, and newspaper articles appeared prior to the election with maps showing the outlines of the subject property and indicating its acquisition.

"24. Plans were finalized for inclusion of an open space bond issue on the September 18, 1973, municipal election ballot. During the campaign leading up to this election, various presentations and publicity depicted the subject property as property to be acquired for public use by designating it on various graphic representations utilized."

City says the land was only a *proposed* park site which would be purchased only *if* the bond issue passed. However, on appeal the court presumes the judgment is correct and views the evidence in the light most favorable to the prevailing party (*Nestle v. City of Santa Monica, supra*, 6 Cal.3d 920, 925-926, 101

Cal.Rptr. 568, 496 P.2d 480). Here, the City's resolution, adopted April 17, 1973, established the need to acquire park reserve areas "to be subsequently identified" as part of a bond issue on the September 1973 ballot. The property here was later identified as a component part of the park reserve system; the property appeared on a map in the San Diego Union as one which was to be acquired under the park bonding issue; it was designated for purchase in the literature given to voters. This supports the findings made by the trial court.

[38] City says there is no evidence to support findings 29 and 32 which read:

"29. The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has further suffered severance damages with respect to the balance of the subject property.

"32. Following the actions of the defendant City in June of 1973, it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space or the remainder of the subject property."

City argues there is no evidence that City would not allow Company to use the land since Company had not applied for and been denied a permit. However, as outlined earlier, Company presented evidence the property was not good for anything except industrial usage; there was an inference from the City's policy of making zoning consistent with the general plan combined with its definitions of open space and the fact it had decided to acquire properties and made overtures as to this land that City would not permit industrial development here; there was expert testimony there was no practical, beneficial or economic use to which the property could be put; there was testimony the best use of the land was public ownership as open space; there was expert testimony the land was not marketable.

[39] City says only about one-half of Company's property that was condemned was rezoned (see fn. 1). However, it was not the rezoning in itself which resulted in the taking. Rather, Company owns land which because of its peculiar geographic situation and topography has a very limited number of uses. It is the combination of this and other factors, such as zoning, general plan, the "consistency" policy, and the resolution to acquire property which led to the condemnation.

[40] City says Company's witnesses testified only as to the economic feasibility of developing the property; this City claims is merely another version of the diminution of value rule and is not a sufficient basis for inverse condemnation (*Pinheiro v. County of Marin, supra,* 60 Cal.App.3d 323, 325, 131 Cal.Rptr. 633). The question asked is whether government regulation has deprived the owner of the beneficial use of its land. Here there was evidence Company could

not develop this land in any way. This is more than just decreasing the value of the land; it is destroying it completely.

[41] City says Company's witnesses contradict themselves when they say it would be futile to seek building approval from the City because none of the experts had that many personal experiences in trying to get permits. However, this goes to the weight of the evidence, a determination made by the fact-finder.

[42] City argues there is no evidence to support finding of fact number 31 which reads:

> "31. Since June 19, 1973, the property designated as open space has been devoted to use by the public as open space."

There is no evidence of actual physical invasion of the property. However, this is exactly what the City is trying to do by acquiring the property, that is, keep it from being used. The Attorney General in its brief argues for extensive protection of the sensitive estuarine ecosystem from the harmful effects of intrusion. The objective here is to have the property remain unused, undisturbed and in its natural state so open space and scenic vistas may be preserved. In this sense the property is being "used" by the public as it has been ever since the date when all the factors coalesced to effect the taking. In addition, there was expert testimony the property had been given over to public use. This was substantial evidence to support the finding.

[43] City challenges the support for and validity of Conclusion of Law #1 which states:

> "1. The actions of defendant City against plaintiff's property were motivated to achieve a public purpose, namely, preservation of open space, without payment of just compensation and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just compensation within the meaning of the California and United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property."

City says there was no evidence here that its acts were not a legitimate exercise of the police power. Whether what may have begun as a legitimate use of the police power became so unreasonable as to be a taking is a question of fact. As noted earlier there was evidence to support a finding that Company had been deprived of all beneficial use of its land. There was evidence one city councilman had stated the city should preserve as much open space as possible through regulatory measures such as agricultural flood plain zoning to reduce acquisition costs; the City Attorney and the Planning Commission were told to prepare a list of open space areas where the City could proceed with agricultural, flood plain and/or LC (limited control) zoning; the open space maps were changed to include more of Company's land without actual notice to the Company; the City reaffirmed some zoning as industrial and changed some to

future industrial and then two weeks later placed the land in open space. This is substantial evidence to support the trial court's conclusion.

The judgment is affirmed.

COLOGNE and STANIFORTH, JJ., concur.

Rehearing denied; STANIFORTH, J., dissenting.

THE JUDGMENT IN QUESTION

The unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division One, reversing the judgment of the trial court, entered on June 26, 1979.

COURT OF APPEAL - FOURTH DIST.
FILED
JUN 26 1979
ROBERT L. FORD, Clerk
DEPUTY CLERK

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN DIEGO GAS & ELECTRIC COMPANY, Plaintiff and Respondent, v. CITY OF SAN DIEGO, et al., Defendants and Appellants.	4 Civ. No. 16277 (Superior Court No. 357022

APPEAL from a judgment of the Superior Court of San Diego County. Jack R. Levitt, Judge. Reversed.

The City of San Diego (City) appeals the judgment after the court found it had inversely condemned property owned by San Diego Gas & Electric Company (Company) which the jury valued at $2,886,300. Additionally, the jury found $283,696 severance damages. The court ordered interest of 7% to be paid on the total, $3,169,996, from the date of taking, June 19, 1973, plus appraisal, engineering and attorneys' fees totaling $122,559.07. After our original affirmance, the California Supreme Court granted a petition for hearing. The case has now been retransferred to us for reconsideration in light of *Agins v. City of Tiburon*, 23 Cal.3d 605.

The property is in Sorrento Valley in the northern part of the City, in the southwest quadrant of the intersection of Highway I-5 and Carmel Valley Road between I-5 and the Torrey Pines State Park; it is generally at low elevation, is a drainage basin, tidal basin or flood plain and is subject to standing water or "ponding"; part is subject to ocean tidal action and portions have been referred to as the Los Penasquitos Lagoon, an estuary and wildlife refuge; a portion is within the State Coastal Act zone.

Company assembled the approximately 412-acre parcel in 1966 and then discussed with City its plan to hold part of the land for possible future construction of a power plant. In 1972 City initiated rezoning hearings for the property which was then zoned industrial (M-1A zone) and agricultural or holding zone (A-1-1); at that time the City General Plan Map designated most of the property as industrial and the remainder as "area for future growth." At the same time, the City Planning Department was preparing an open space plan for the city which ultimately was entitled "A Plan for the Preservation of Natural Parks for San Diego" and included about 230 acres of Company's land. In addition, in early 1973, the Community Development Department prepared a staff report entitled "Park Reserve Systems," which discussed the financing and acquisition of park reserve lands and got estimated values for the proposed park properties, including the property in question here, as part of a bond proposal to be put before the electorate in September 1973.

The City Council, on June 7, 1973, downzoned some of the land from industrial to A-1-10 and part of the A-1-1 land was designated for future industrial development; the rest of the land in the industrial zone

retained its industrial classification.[1] On June 19, 1973, City adopted the open space element of the general plan which covered all of the land found condemned here, about 233 acres. In September 1973 the report of the Community Development Department was received and this property appeared on maps as one of the properties to be acquired if the bond issue passed. It failed. A year later Company filed suit.

The City claims its acts in zoning the property for light industry and agriculture with an open space general plan designation do not constitute a taking or a damaging of property. Company claims City has inversely condemned its land because the zoning regulations combined with the open space element of the general plan has made the property useless.

The power of eminent domain is the state's inherent power to take private property for public use (*Rose v. State of California,* 19 Cal.2d 713, 719). However, the state is limited in exercising this power by Article I, section 19 of the California Constitution which assures the private landowner he will be compensated if his land is taken or damaged.

The state derives its authority to zone property from the police power, the government's power to enact regulations to protect the health, safety and welfare of its citizens. Unlike the person whose

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FOOTNOTE 1: From 1966-1973 the property was zoned:

Industrial (M-1A)	116 acres
Agricultural (A-1-1)	112 acres
Agricultural holding zone	

After the rezoning the land was classed as:

Industrial (M-1A)	77 acres
Agricultural (A-1-10)	39 acres
Agriculatural [*sic*] holding zone (A-1-1) with 50 acres to be considered for future industrial use.	112 acres

property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation (*Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515, 530). In California the general rule is that a rezoning which reduces the market value of the land does not give rise to a cause of action in inverse condemnation (*HFH, Ltd, v. Superior Court,* 15 Cal.3d 508, 514). A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus (*Agins v. City of Tiburon, supra,* 23 Cal.3d 605, 611).

Company complains it has been denied all use of its land which is zoned for agriculture and manufacturing but lies within the open space area of the general plan. It has not made application to use or improve the property nor has it asked City what development might be permitted. Even assuming no use is acceptable to the City, Company's complaint deals with the alleged overzealous use of the police power by City. Its remedy is mandamus or declaratory relief, not inverse condemnation. Company did in its complaint seek these remedies asserting that City had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element or by applying the zoning and general plan unconstitutionally. However, on the present record these are disputed fact issues not covered by the trial court in its findings and conclusions. They can be dealt with anew should Company elect to retry the case.

The judgment is reversed.

Brown
P.J.

WE CONCUR:

Cologne
J.

Stanton
J.

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Excerpts from testimony of **Frank DeVore**
(called as witness by the plaintiff)

. . . .

[2]

Current employment?

San Diego Gas & Electric Company.

What is your job title there?

Director of Governmental Affairs.

. . . .

[3] Q. What were your general responsibilities during the 10 years that you were manager of the Engineering Land Department?

A. General responsibilities covered the entire gambit of land matters -- responsibility for land acquisition, for land planning, for acquisition of major right-of-ways, power plan projects, substations, public hearings, zonings in connection with the uses of those properties --

Q. And you were planning engineer of the Engineering Land Department in 1972 and 1973 when the events that are the subject of this lawsuit were taking place?

A. Yes, I was.

Q. What particular responsibilities did the manager of the Engineering Land Department have with respect to actions of the City in terms of zoning and planning such as involved here?

A. The planning engineer of the Land Department had the total responsibility for determining the use of property, what types of actions were required within the corporation to process rezonings to obtain the information needed and used in the appraising of land and in the acquisition of land.

[4] Q. Okay. Now, in your duties with the company over the years, have you been involved in the development of land as well as the acquisition of it?

A. Yes, I have.

Q. And can you give us some examples of those types of responsibilities?

A. Well, to speak as far as the company is concerned, I have been involved in the acquisition of properties and processing their building permits, the zonings, the land use requirements for many of our office buildings, for instance, our corporate office headquarters, I was planning engineer of the Land Department during the acquisition, the planning for it and the building and zoning requirements for that facility.

. . . .

[7] Q. When did the company first become interested in the subject property?

A. In 1965.

Q. What was the interest of the company at that point?

A. Well, the company, in the process of its operation as a utility, must look ahead for future power plant sites. It is very common for utility companies to continually investigate appropriate locations for these facilities. It's obvious with the long-time delay between the acquisition of a site and the use of it for a power plant facility for these types of purposes that a lot of things can change on the property. It's always envisioned the property will not, in any event, go down in value, that it would ordinarily be available, if it can't be disposed of, so that it is proper to acquire sites for long-range power plant purposes. That was the case of the company's interest in acquiring this parcel of property.

[8] Q. So you identified a need for acquisition of this property?

A. A long-range planning need for utility power plant purposes.

. . . .

Q. What specific steps did you go through until the property was actually acquired?

A. Searching of properties, determining who had ownership to the property, determining land use zonings, determining what interests were involved by others other than the actual fee owner of the property, making appraisals on the property, and ultimately then negotiating for its acquisition.

[9] Q. In the course of those investigations, did you have consultation with the City of San Diego?

A. Yes, we did.

Q. What was the nature of those consultations?

A. Consultations with the City planning engineer and primarily in connection with disclosing that we were planning to look at this property for a future power plant site, and actually in negotiating to acquire a parcel of land from the City of San Diego.

Q. Then eventually how much property was identified for acquisition in the area of the subject property?

A. Approximately 258 acres -- 260 acres.

Q. And approximately how much was paid for that property?

A. A million -- Approximately $1,770,000.

Q. Okay. Now, you've indicated that, in fact, one of the parcels was acquired from the City of San Diego?

A. Yes, sir.

. . . .

BY MR. GOEBEL:

[12] Q. Mr. DeVore, you previously started to describe some of the general characteristics of the subject property. Would you continue and discribe the zoning and general plan designation of the time of acquisition?

A. Well, the general plan designation was industrial. A portion of the subject property lying immediately adjacent to the Santa Fe railroad right-of-way, which is immediately adjacent to our west property line, is zoned industrial. A portion of the property lying adjacent to the

southeast quadrant of Interstate 5 and Carmel Valley Road was zoned A-1. A piece -- The small parcel of property in the upper left-hand corner or in the northwest of the property that's outlined in red on the map is zoned R-1, and that's it, sir, for the subject parcel.

[13] Q. Okay. Now, does Plaintiff's 1 then depict fairly and accurately the physical condition of the property as it existed in 1966?

A. Yes, sir.

Q. And does that also generally depict the condition of the property in 1973?

A. Yes, sir.

. . . .

[25] Would you describe for the Court what uses are authorized within the M-1-A zone?

A. In a broad sense, generally industrial uses, but in a little more detail, research development, what is considered light manufacturing such as electronic parts, various types of assembly facilities, storage, generally those facilities compatible with producing or the production of salable articles, commodities.

Q. What uses are authorized in the A-1-10 zone?

A. Houses, farming, golf courses, raising of animals, but the number is restricted as is the number of houses per acre.

Q. What is the density of residential development permitted?

A. In the A-1-10 zone?

Q. Yes.

A. One house for every 10 acres.

. . . .

[34] THE WITNESS: What happened was: Prior to the down zoning, this area was zoned industrial, and after the zoning --

BY MR. GOEBEL:

Q. Mr. DeVore, so the record is clear, you're then pointing --

THE COURT: Those areas marked A and B?

THE WITNESS: I'm sorry. I'll do a better job.

Prior to the final action by the City Council, the subject property marked "A" on the map was zoned industrial. After the rezoning, the property marked -- subject property A on the map was rezoned agricultural, A-1-10. The property shown as "B-1" remained industrial, and a portion of property that had prior to the down zoning action been designated A-1-1 was accepted by the Council as remaining for future development upon the filing of a specific plan map, and that's shown on the map marked Exhibit C -- or letter C.

BY MR. GOEBEL:

Q. There's another parcel designated B-2 to the west of the railroad tracks?

A. That's correct.

Q. And what happened to that one?

A. That was originally industrial, that area shown in B-2, and after the down zoning, remained industrial.

Q. Then was there any other action before the City Council in June of '73 with respect to the subject property?

A. Yes. On June 19th, 1973, the City Council adopted an open space element to the general plan.

[35] Q. Okay. And as of June 19th, 1973, what was your understanding of the ultimate outcome of the various actions taken by the City with respect to the subject property?

A. Well, the City Council had down zoned a portion of our industrial property shown on the map as -- under letter A, to agricultural, and they had drawn a line near the midpoint in the

property, and everything south of that was industrial and/or reserved for industrial, and then everything north of that line had been earmarked for open space.

Q. Okay. Did subsequent investigation indicate a different result, actually?

A. Yes, it did.

Q. And how did you learn that?

A. We were at a meeting of the -- of a planning group in the Torrey Pines area, and after some two years of working with the City on attempting to keep our property industrial, we were comparing maps, and we determined that the map that one of the persons had at that meeting showed a different area of open space than the one we had. We later -- or within a very short time the next day, we reviewed the records of the City Clerk to determine actually what maps would be correct, and we found that the map that was on file at the City Clerk's office actually showed all of our property as being designated open space.

[36] Q. And approximately what date was this?

A. Within a very few days after the 19th. I'm not certain I can remember.

Q. Mr. DeVore, I ask that a document entitled, "Plan for Presevation [*sic*] of Natural Parks for San Diego," be marked for identification as Plaintiff's 11. It contains writing on the front "Exhibit 1."

(Plaintiff's Exhibit No. 11
was marked for identification.)

Mr. DeVore, I ask you to examine Plaintiff's 11 and see if you can identify it?

A. Yes. It -- It's a copy of the Plan for the Preservation of Natural Parks for San Diego and was obtained by one of my people from one of the members of the Planning Department of the City of San Diego.

Q. Would you examine Map 1 in Plaintiff's 11 and determine if it's any different as to the subject property from Map 1 in Plaintiff's 10?

A. Yes, it is different.

Q. How does it differ?

A. Well, it differs in that part of it is light green now instead of dark green, in fact, most of it is light green, and it covers what I assume to be and I believe to be all of our property south of Carmel Valley Road and east -- or west of Interstate 5.

[37] Q. Now, would you also examine in Map 2, in Plaintiff's 11, and Map 2 in Plaintiff's 10 to determine if the same difference appears?

A. Now, what was the question, please?

Q. See if the same difference appears with respect to Map 2?

A. Yes, it does; yes, it does appear. One covers all of the property, and the other covers that portion which was the north line of what I call the down zoning.

Q. Okay. And there appears to be a legend by colors on Map 2 to Plaintiff's 11. What is the color-coded information with respect to the subject property? This is Plaintiff's 11.

Q. Okay. It designates different methods of obtaining the open space. The darker green is to be acquired from the public through public and private means, and then there's a lighter shade of green which is limited development to be obtained through limiting the development of the land, and that real light green on the map is to be -- is lands that are already publicly owned and are to be retained and not disposed of.

Q. And what color is the subject property?

A. The subject property is dark green which represents acquisition through public or private means.

. . . .

BY MR. GOEBEL:

[39] Q. Mr. DeVore, I've put down the next overlay on Plaintiff's 1 which we will ask to be designated Plaintiff's 1-C, which is entitled

"Industrial Zoning as of June 3, 1973." Would you approach the exhibit, please.

(Plaintiff's Exhibit No. 1-C was marked for identification.)

Does that then represent the extent of industrial zoning to your knowledge, that existed as of June 7, 1973?

A. Yes, sir.

Q. And what's the significance of the cross-hatched parcel?

[40] A. The significance of the cross-hatched parcel represents that portion of our property that was agricultural, but during the rezoning was earmarked for reservation for future industrial upon the filing of a specific plan.

Q. Okay. Now, I'll drop down to the next overlay which is entitled "Open Space Reservation, June 19, 1973," and ask that to be designated Plaintiff's 1-D.

(Plaintiff's Exhibit No. 1-D was marked for identification.)

Does that depict the area that was, to the best of your knowledge, designated in Plaintiff's 11 as open space for public acquisition?

A. Yes.

. . . .

[41] Q. Mr. DeVore, I previously asked you a question that, to the effect -- as of June 19, 1973, what was your understanding of the outcome of the various acts of the City, and that was before you had learned of the discrepancy? Now, after you learned of the discrepancy, what was your understanding of the total outcome of the acts of the City?

A. The total --

MR. SUMPTION: Objection, your Honor; irrelevant.

THE COURT: Overruled.

THE WITNESS: Well, the -- our reaction was that --

BY MR. GOEBEL:

Q. Your understanding of the effect of it.

A. My understanding of the effect of it was and is that the property now had over it an open space overlay zone that took precedence over the agricultural and industrial zone, and there are little or no uses that one can make in the open space zoning for any economic value, that we had completely lost within a period of time our industrial zoning.

Q. Okay. What action, if any, did you take after learning of this discrepancy?

A. I immediately -- several of us, myself included, contacted the City Planning Department on several trips over there, several phone calls, and explained to them the circumstances that we felt had taken place, the confusion or the filing of certain maps that were not at the public hearing.

[42] Q. Did you take any action to formally communicate your objections to the City?

A. Yes. I wrote a letter to -- finally wrote a letter to the Planning Director asking him to clarify or rectify the situation in that we believed that a considerable injustice had been done to our property.

MR. GOEBEL: I request that a letter dated November 14, 1973, from Mr. DeVore to Mr. Goff be marked as Plaintiff's 12.

THE COURT: It may be so marked.

(Plaintiff's Exhibit No. 12 was marked for identification.)

MR. GOEBEL: And a letter dated January 31, 1974, from Mr. Goff to Mr. DeVore be marked Plaintiff's 13.

THE COURT: It may be.

(Plaintiff's Exhibit No. 13 was marked for identification.)

BY MR. GOEBEL:

Q. I show you Plaintiff's 12, Mr. DeVore, and ask you if you can identify that?

A. Yes, I can. It's a copy of the letter that I mailed to Mr. Goff on November 14.

Q. Okay. What action, if any, did the City take in response to your letter?

[43] A. Mr. Goff wrote a letter back to me stating that he concurred that there was an error made and that we should have been present to protect our interest.

Q. I show you Plaintiff's 13 and ask if that is a letter you received back from Mr. Goff?

A. Yes. It is dated January 31st.

Q. I would offer Plaintiff's 12 and 13.

THE COURT: Any objection?

MR. SUMPTION: No objection.

THE COURT: They are received.

(Plaintiff's Exhibit Nos. 12 and 13, previously marked for identification, received into evidence.)

BY MR. GOEBEL:

Q. Mr. DeVore, we've now discussed the subject of rezoning, and we have also discussed the subject of adoption of the open space element of the general plan. To your knowledge, did the City take any further steps during April to June of '73 with respect to acquisition of park preserve areas?

A. Well, they began to conduct a campaign toward interesting the voters and informing the public on the concept of having voter approval to acquire the open space lands. There was effort on behalf of the City and other groups to elicit support for advertising and what have you preparatory to the September election.

[44] MR. GOEBEL: And I ask that a document entitled "Staff Report, Park Preserve Systems, April 23, 1973," be marked for identification as Plaintiff's 14.

THE COURT: It will be so marked.

(Plaintiff's Exhibit No. 14 was marked for identification.)

BY MR. GOEBEL:

Q. Mr. DeVore, I show you Plaintiff's 14 and ask you if you can identify that?

A. Yes. It's a staff report on park reserve systems, April 29, 1973, and it's my knowledge that it was prepared by the Community Development Department.

Q. Okay. The back of that, Plaintiff's 14, there is a fold-out map. Can you identify the subject property on that map?

A. Yes, I can. It's in a group of properties marked No. 3. It covers all of our property. That portion they wish to acquire includes all of our property east of Interstate 5 -- I'm sorry, west of Interstate 5, and it's grouped in a group that's referred to as the Los Penasquitos, McGonigle Canyon, Carmel Valley --

Q. Now, also included in that same Plaintiff's 14 is a table entitled "Table to Park Reserve Funding." Can you locate any reference to the subject property on that?

A. Yes. It's listed here under "map area 3-A and 3-B."

Q. And what words does it -- Does it use words?

[45] A. Yes. Opposite the 3-A map, it has "Community Subdivision, Penasquitos and $900,000 total cost, percent of City participation 75 percent, bond funds $675,000 and assessment district's revenue sharing $250,000."

3-B is McGonigle Canyon and the total cost $675,000, and City participation 75 percent, bond funds $506,300, and assessment district revenue sharing $768,700.

Q. Referring to the -- back to the map in the area you've previously testified to as Area 3, would the area east of Highway 5 in the area designated "3" commonly be referred to as McGonigle Canyon?

A. Yes, sir.

MR. GOEBEL: I ask that a newspaper clipping entitled "Proposition B, Proposed Park -- Park Preserve. . ." -- they changed the name on me -- "Proposed Preserve Systems" be marked for identification as --

THE COURT: 15.

MR. GOEBEL: -- Plaintiff's 15.

THE COURT: It may.

(Plaintiff's Exhibit No. 15 was marked for identification.)

BY MR. GOEBEL:

Q. Mr. DeVore, I show you Plaintiff's 15 and ask you if you can identify that?

A. Yes

Q. What is it?

[46] A. It's a picture that appeared in the San Diego Union on September 4, 1973, and is identical or nearly identical to that that was prepared by the Community Development Department showing the various properties to be acquired under the park bonding issue if it was successful.

Q. Can you locate the subject property on that graphic presentation?

A. Yes. It's again shown in group 3 and is referred to on the map as Los Penasquitos Lagoon, Carmel Valley, McGonigle Canyon.

Q. Would you indicate that on -- in red, drawing a circle around it. You've now placed a red circle around the subject property as it appeared in Plaintiff's 15.

A. Yes, sir.

Q. Would you do likewise with respect to Plaintiff's 14?

You've now indicated on Plaintiff's 14 in a red circle the subject property

A. Yes, I have.

Q. Would you also in the table highlight the two entries that you had referenced to in red?

Now, Mr. DeVore, following June 19, 1973, to what use has the subject property been devoted?

A. None.

Q. You've made no additional use of the property?

A. None at all.

[47] Q. Prior to June of 1973, had the company contemplated any possible development of the subject property for industrial uses?

A. Yes. We had contemplated some other uses of it. We were beginning to learn through various studies and reviews that the property would probably not be suited for a power plant site, and therefore began to give considerations to doing something with the property in order to return its investment to the rate payers and while we had not -- while we had not actually filed maps or prepared drawings, there were discussions within the management level of the corporation giving this some early consideration.

Q. Following June 19, 1973, did you consider applying for necessary approvals for the development of the property for industrial use?

A. No, sir.

Q. Why not?

A. Because it was our opinion -- and I recommended that based upon past experience of seeing other properties in such a position or such a zoning condition not being able to be developed that there being long delays of -- and expenditures in trying to overcome opposition such as had been placed on the property, so that we did not make an attempt to begin a development plan for the property.

Q. So then in your own experience you had observed property owners in similar positions, seen property owners delayed excessively?

[48] A. I have; and there are those in this community.

Q. In your judgment, are there any practical, beneficial or economic uses to which the company can devote the property in the condition that existed after June 19, 1973?

A. No.

. . . .

[58] THE COURT: Do you have an opinion as to whether there are any economic uses the company could devote the property to subsequent to June 19, 1973?

THE WITNESS: Yes, I do.

BY MR. GOEBEL:

Q. Mr. DeVore, what steps have you gone through in terms of developing that opinin [*sic*] in terms of investigation, analysis, considerations that were applied to developing that opinion?

A. Well, I have reviewed, for example, the agricultural zones of the City of San Diego, and I have been experienced -- I have ample experience in reviewing and listening to the City Planning Department and the City Council discuss other similar matters where there was an open space zoning over the land.

Insofar as there being any use, economic use, that you could put the open space land to, it is my opinion that there is none. If one were to go back one step removed and say, well, all right, but maybe you could put it to some use under an agricultural zone which is probably the nearest thing to an open space zone that we have, the agricultural zone permits one house for every 10 acres, and that is not economical. One might say, well, there's a possibility of a golf course, and there are, what, 60, 70, or 76 of those in our community, and they must all have some source of income other than just a golf course, and one could not
[59] put a golf course here with houses at one for every 10 acres. You could not feasibly, in my judgment, from my knowledge of managing farm lands, farm this property. You could not raise livestock on it because

you are limited to the number. There are many examples that can be referred to in our community and in the surrounding region where people under the same circumstances have not been able to develop their land for anything at all, and I find that there is just no economic benefit to this property, and I so advised the corporation, and they have accepted that position.

Q. Okay. In your judgment, are there any practical or beneficial uses, aside from the ones you've addressed yourself to, that the property could be devoted to by a private property owner?

A. No. I think for the most part with the open space zone on our property, we've given the property up for public use, and I think that's where the property and the interests of the property exist at this time.

Q. In your opinion, is the property marketable at present?

A. No, sir, it is not.

. . . .

BY MR. SUMPTION:

[66] Q. Okay. So it was the same green open space plan that you had received a copy of, only you noticed that there apparently was some difference in the map?

A. Yes.

Q. Was this in connection with a community plan?

A. No, sir. At a community plan meeting, a group of citizens approved by the City Council who were involved in trying to determine what the best interests were for their own community insofar as land use is concerned.

Q. Do you remember if any City staff members were present, City employees?

A. I don't remember.

Q. Mr. DeVore, I believe that you testified in reference to Plaintiff's Exhibit 1-C that the area marked with a "C" in it that's got blue lines drawn across it was indicated an area that was earmarked for future industrial use. Could you explain what you mean by earmarked?

A. Well, earmarked was a quote on quote, a word I used. The precise language of the council's action was that the property was going to be left in its agricultural zoning, but it could be used for industrial upon the filing of a future specific plan.

Q. All right. You also indicated, I believe,

. . . .

[78] Q. Has the Gas & Electric Company solicited any offers to purchase the subject property since the actions of the City in connection with the rezoning and open space designation?

A. No, we have not.

Q. Mr. DeVore, I believe you testified that you have, through a review of the various City zones, permitted uses in the various City zones and also in connection with your observations of the city with respect to actions with respect to allowing land uses of properties, have concluded that the open space designation would preclude these -- or perhaps preclude is not an accurate description, but in view of that designation, the City would not allow, in your opinion, any use of that property; is that a correct statement of your testimony?

A. I don't think that's a correct statement of my testimony. I think my testimony was on the basis of economic use, not that the City wouldn't allow a use. I have no doubt that the City would allow you to try to run the prescribed number of cows, for example. I don't know that they would permit you to build a house down in the valley.

Q. Mr. DeVore, for example, the -- your understanding is the open space designation encompasses the whole of the subject property excepting the portion marked B-2?

[79] A. Yes.

Q. Is that not correct?

A. Yes.

Q. And that portions to the south of the line that we see on Exhibit 1-B, that's drawn somewhere in the middle portion of the property in an approximate east and west fashion, are zoned for M-1-A industrial use.

Was your testimony that you didn't believe the City Council, in view of the open space designation, would not allow any industrial use of that property?

A. That was my testimony.

Q. Well, that's what I was referring to. Apparently I didn't focus in specifically enough on it.

Are you aware of any particular instances where the City has denied an application for the use of any piece of property within the City on the basis that there's an pen [*sic*] space designation on the property, but there is also an underlying zoning, and the application entails something permitted by the underlying zoning?

A. I'm not specifically aware of those, and perhaps other witnesses can testify to that, but I do have knowledge that the City -- of properties within the city that have been held up from zoning for many, many years because of the open space zoning designation on them -- or from development, I mean.

Q. Isn't it a fact that the properties you're referring to have been or are in the process of being purchased by the City?

[80] A. Well, they were -- They are -- They may be now in the process of being purchased, but at the time of the owner's plans to develop them, they were not -- the City did not intend to acquire them, but after several years, that's the way it's worked out.

Q. Do you have any knowledge of whether or not the owner may have consented to a delay or deferral of the plan to build because the City was interested in purchasing?

A. There are those instances where, after a period of many, many tries and attempts and expenditures, that the developer has agreed to delay planning because the City finally has said, "We'll consider buying it."

. . . .

Excerpts from testimony of **Donald Worley**:
(Called as witness by the Plaintiff)

. . . .

[82] Q. Would you give the Court a brief background of your formal educational experience?

A. Yes, I was graduated from Yale University in 1960 with a Bachelor of Arts in Psychology. I have a year of graduate work in psychology at the University of Michigan, and I graduated in 1970 from the University of San Diego School of Law with a juris doctorate, magna cum laude.

Q. Since that time, have you been engaged in the private practice of law in San Diego?

A. Yes, I have.

Q. Have you developed a specialty in an area of practice in that time?

A. Yes, I have. I specialize in zoning, planning and land use regulation law.

Q. Could you be more specific in terms of the types of matters that you might become involved in in the course of your practice in that area?

A. Generally, I would be involved with advising clients as to the application for and the process of applications for the development of land including rezonings, subdivision maps, planned residential development applications. I would represent them before the political bodies including Planning Commissions and City Councils, and I would also conduct civil litigation involving those issues.

[83] Q. Without breaching any client confidences, can you indicate some of the projects you've been involved in over the years of your practice in this general area?

A. Yes, I think I can indicate some representative clients. I have handled basically all of the zoning and planning work for Marin Housing Guild (phonetic spelling), Larwin, and I represented Dr. Leonard Bloom in all of his proceedings before the City of Chula Vista

concerning the Sports World Plan, concerning the Plaza del Rey Shopping Center. I've worked with the Pacific View Construction Company concerning the processing of development plans for the Tecolote Canyon area. I've represented other clients including Harry L. Summers, Incorporated, Avco Community Developers, Southern District Council of the Assemblies of God Church, the Diocese of San Diego, and other clients all concerning land use methods.

Q. Have some of these matters actually involved designation of properties as open space?

A. Yes.

Q. By governmental agencies?

A. Yes.

[84] Q. Have you, in fact, represented some governmental agencies in the course of your work?

A. Yes, recently I've represented the Local Agency Formation Commission concerning the requirements for the environmental impact for the deannexation of San Ysidro, and I recently represented the City Council of the City in a conflict of interest lawsuit.

Q. Mr. Worley, we're concerned here with the rezoning of certain property and designation of certain property as open space in the open space element to the San Diego general plan. You're familiar with the legal background of the adoption of the open space element to the City's general plan, are you not?

A. Yes, generally familiar.

Q. And you're also familiar with the various processes and requirements of the City of San Diego with respect to the processing of development applications in San Diego?

A. Yes, I am.

Q. And you're familiar with the applicable law that's related thereto?

A. Yes, I am.

Q. And you're familiar with the practical aspects of litigating matters resulting from disputes in that area?

A. Yes, I am.

Q. Now, we have in evidence in this matter the fact that the property described on the exhibit that I'm now indicating to you -- trying to indicate to you -- the property outlined in green on Plaintiff's Exhibit 1-A was formally zoned M-1-A. Then we further indicate that a portion of that property was rezoned to A-1-10, the parcel designated as parcel A on Plaintiff's Exhibit 1-B, that the underlying zoning with respect to parcels B-1 and B-2 on the same exhibit remained M-1-A.

[85] Then we further have in evidence then that accordingly parcel B-1 and B-2 of Plaintiff's 1-C remained in the industrial zone. We further have in evidence that the defendant City of San Diego in the adoption of its open space element to its general plan in June of 1973 designated this entire property that I've previously referred to as open space for acquisition through public or private means as depicted on Plaintiff's Exhibit 1-D, so those matters are in evidence here, and I ask you to assume for purposes of the remaining questions that those are the facts.

Just to review those assumptions again, I wish you to assume that the property that we're talking about, the subject property, has been designated as open space in the City's general plan as of June, 1973, and I want you to assume that a portion of that property has an underlying or existing zoning of M-1-A, light industrial. I want you to further assume that a development proposal was formulated which, in all material respects, conformed to the customary land use criteria applied by the City of San Diego with the exception of the possible relevance of

[86] the open space designation.

Do you have these assumptions now in mind?

A. Yes, I do.

. . . .

BY MR. GOEBEL:

Q. What is your professional opinion, assuming those facts, Mr.

[87] Worley?

MR. SUMPTION: I will object to the question on the basis that, number one, it calls for speculation. Number two, on the basis that I

indicated at the preliminary proceedings before the trial commenced that under Evidence Code Section 801, the Opinion I don't believe would aid or assist the trier of fact which is the criteria for introducing testimony by way of an expert witness. It, in essence, calls for a mixed question of fact and law, and in the factual aspect as to -- is there any reasonable probability of what the Council might do as far as approving such a hypothetical plan is -- would be purely speculative without knowing what the plan is so that the -- and without all the other elements such as department staff analysis, recommendations, pointing out the physical effects, environmental impact reports, et cetera. There would be no way that anyone, with all due respect to Mr. Worley, could predict such an outcome of this hypothetical situation.

[87] THE COURT: Mr. Goebel?

MR. GOEBEL: Yes, your Honor, I have sought to meet the objections of counsel in asking the witness to assume that the proposed development plan conforms in all respects with the land use criterion customarily applied by the City of San Diego. I might add that I will be offering testimony at a later time in the trial indicating that, in fact, in the opinion of another expert, such development plan did exist and was
[88] available, could have been devised as of June of 1973 that would have conformed and that there was a reasonable probability that that development would have been approved by the City of San Diego in the before condition of the property without the open space designation, so I'm asking this witness to assume that, and if --

THE COURT: You say this evidence that would be presented through another witness that you intend to qualify as an expert?

MR. GOEBEL: As an expert in the area of land use planning.

THE COURT: I assume Mr. Sumption would object to that opinion as well.

MR. SUMPTION: I would, your Honor, and I don't see what relationship that has to the question now being asked.

THE COURT: Mr. Goebel is now addressing himself to the relevance as distinguished from the expertise of the witness.

MR. SUMPTION: I understand that, but I don't even believe that it would be relevant as to what could have been done in the before condition and now what might be done with the property in the after condition. As far as the hypothetical, it's never been put before the City Council.

MR. GOEBEL: Well, we were looking at the property -- we have to establish what the before condition was and what the after condition was. The cases indicate that we do not look at these matters in the
[89] abstract. We look to the specific property. We look to see how the particular purported exercise of the police power, what impact it has on the specific property, not what it has on some arbitrary property off in the abstract, and so here I'm asking the witness to assume all the details.

THE COURT: I understand. The objection is not to the -- is not to the content -- Well, yes, perhaps it is. I see a difference here, Mr. Goebel, between the witness stating as an ultimate opinion whether the City Council and/or Planning Commission would have taken particular action from the circumstances which is admissible of an expert who is giving a valuation opinion, making an assumption as a basis or part of the basis for that opinion that the City Council or Planning Commission would not approve or would approve a zone change, but for the taping.

MR. GOEBEL: Well, we approach the subject very freshly in straight condemnation actions in the area of the highest and best use. We have to have an expert to testify that if the appraiser intends to use the highest and best use not called for by the zoning, we ask the expert to testify that there's a probability that the higher use could be obtained.

THE COURT: That's the point I was just making. That determination is a part of that which goes to make up his opinion. Here, you are asking for this as the opinion.

MR. GOEBEL: Well --

[90] THE COURT: The trier of fact in the other circumstances can weigh the opinion based upon the reasoning of the witness, and if the trier does not accept as proper reasoning that the Council would or would not have, then it either adds or detracts from the ultimate opinion, but here you're asking to let in that opinion.

MR. GOEBEL: Well, the --

THE COURT: It's difficult for me to concede how this witness or any other witness could form a meaningful opinion as to what the City Council would do in the abstract.

In essence, you're asking the witness to state that the City Council would not grant any use under any circumstances once they put open

space on it. That's what --

MR. GOEBEL: I've framed it in terms of reasonable probability, and I guess I am approaching the question in the affirmative when it could also be approached in the negative, is there a reasonable probability that the City Council would use the open space designation to bar development of the property irrespective of whether a good development plan --

THE COURT: And that is what is not the subject of expert opinion. That is simply surmise on any witness' part as -- that the City Council would do that.

MR. GOEBEL: Well, this witness has testified that he appears regularly before the City Council and he's giving the benefit of his practical experience that the Court cannot have because of being tied to the courtroom.

[91] THE COURT: But his appearing regularly before the City Council does not make him clairvoyant as to the thinking processes of the City Council members.

MR. GOEBEL: Well, I'm not asking him to opine, and I will direct him not to opine on the subjective motivation.

THE COURT: But you're asking him to do that when you're asking him his opinion.

Mr. Worley, have you personal knowledge of the City Council denying applications for zone change or variances or any other applications made to them solely on the basis that the property has been designated for open space?

THE WITNESS: Yes, your Honor, I do.

THE COURT: And in how many such instances?

THE WITNESS: One within the past year that I was personally involved with.

THE COURT: And the City Council stated that that was the sole reason for their denying the application?

THE WITNESS: I would have to answer that question no, they didn't so state it, but in light of all the circumstances, no other reasonable inference could be drawn.

THE COURT: In your opinion?

THE WITNESS: In my opinion.

THE COURT: And therefore you see, Mr. Goebel, he's endeavoring to infer an opinion from an opinion.

MR. GOEBEL: Well, I guess I keep --

THE COURT: Why is this witness in any better position to form the
[92] mental processes of the City Council than the Court, given the facts of the presentation or application to the City Council?

MR. GOEBEL: Well, I guess I keep shifting back from expertise to relevancy because in my mind they're so closely tied together, but it seems to me I'm asking this witness to do the same thing in his area of expertise as we asked Mr. DeVore to do in the area of economic feasibility. We could have the economist sit down and do a mathematical model of the economics, but I felt that the testimony is more proper to have a person with practical experience such as Mr. DeVore testify to that. Here, I'm asking this witness not to define the subjective motivation of the City Council, but to testify based on his practical experience as to what is the feasibility of getting a plan through, given the fact of this designation.

THE COURT: But his practical experience is solely resting upon his subjective opinion of the mental processes of the City Councilmen.

MR. GOEBEL: Well, it's also resting upon two different legal bases. He also is aware of the law, and he's aware of the practical aspects of litigation of these matters, and they are two separate legal bases upon which the Council could, as a sole basis, deny this project.

MR. SUMPTION: And that, your Honor, would be calling for what
[93] the City would do as an attorney, and the City is not an attorney. The City Attorney's Office advises the Council. There are so many elements that make it pure speculation that I can't see that it can be advisable.

THE COURT: The objection is sustained. You may endeavor to lay a further foundation, but under the present status of the evidence --

MR. GOEBEL: I'm not -- Perhaps I can have the objection -- basis for the ruling restated that it's on the ground that the witness would be required to speculate?

THE COURT: Yes, he is not sufficiently qualified to give an opinion as to what the City Council would do under the hypothetical you presented.

MR. GOEBEL: Well, let me attempt to rephrase the question.

THE COURT: You may.

BY MR. GOEBEL:

Q. In your -- Do you have a professional opinion as to whether the City of San Diego could purport to deny any industrial development plan on this property based on the assumed facts on the sole basis that the development proposed was inconsistent with the open space designation on the subject property?

A. I --

MR. SUMPTION: Object, it's closer to a pure legal question of interpretation of the effect of the acts done by the City Council.

[94] THE COURT: If I understood the question as phrased, the question was whether he had an opinion that the City Council could purport to deny the application.

MR. SUMPTION: I interpret that as meaning, your Honor, are they legally compelled to do one thing or the other, and I don't know if that's the intent.

THE COURT: As phrased, it's asking the witness whether that is physically possible, and, of course, the answer has to be yes. That's obviously not what he meant. Would you rephrase the question?

MR. GOEBEL: I think I'll approach it a different way.

Q. Mr. Worley, in your professional opinion having advised clients in this area on a number of instances, would it have been on the basis of the assumed facts, reasonably prudent for a property owner to incur the expense of preparing development plans and submitting them for approval to the City of San Diego?

MR. SUMPTION: Object to the question. I think it's just seeking indirectly what the Court has ruled cannot be asked directly. I think it's just one step removed.

MR. GOEBEL: We're not into a different area, talking about the plaintiff being deprived of any practical additional or conomic use of the property, and one element is the fact of whether it wuld have been prudent for the plaintiff, as the property owner, to have incurred the expense necessary to even reach a decision as to whether or not the
[95] property could be developed.

THE COURT: If the question, Mr. Goebel, is designed to explain the reason why the plaitiff did not seek such relief from the City, it would be relevant and admissible. On the other hand, if the thrust of the question is to convince the trier of fact that the City Council would not have granted the relief, it meets the same objection that the Court has earlier sustained.

MR. GOEBEL: Well, I would apply it to both, but I think it's admissible then for the limited purpose that the Court has indicated.

THE COURT: The Court will admit it for that limited purpose.

The substance of the question is whether you, in your expert opinion, would have advised the plaintiff that it would have been meaningless to have prepared and submitted plans to the City under the circumstances.

THE WITNESS: Yes, I would have so advised.

BY MR. GOEBEL:

Q. Mr. Worley, what is the basis for your opinion -- or would be the basis for your advice?

A. Well, the basis would be that, in my opinion, the open space designation would preclude development for several reasons. The first
[96] being the existence of a section of the planning act which, by its terms, preclude development by precluding issuance of a building permit or the approval of a subdivision map if the particular development is not consistent with the open face [*sic*] element.

Secondly, there's a provision of the Subdivision Map Act, and I would also presume that a development of this magnitude would likely result in the requirement for the filing and recordation of a subdivision map bringing into play that requirement of the Subdivision Map Act. I believe that's Section 66474 of the Government Code which mandates that a City Council deny approval of a tentative subdivision map if it is not consistent with applicable general and community plans inasmuch

as the open space element is a portion of the City general plan, it would -- the subdivision map would be inconsistent with the open space element since the second legal ground and the third would be simply that the designation of the property as open space, based upon my experience, is indicative of the Council will not to permit development on that property, and based on my experience, they would do everything possible including full use of the legal and Code sections that they have available to preclude development and to deny a development plan, so I believe that all things considered, it would not be prudent or not be a prudent expenditure of time and money to process a development plan under the circumstances.

MR. GOEBEL: I have no further questions.

THE COURT: You may cross-examine.

- - -

CROSS-EXAMINATION

BY MR. SUMPTION:

[97] Q. Isn't it a fact that you have pending in this Superior Court a lawsuit entitled Hall, et al., vs. The City of San Diego that raises substantially the identical issues that you've just testified to?

A. Yes, that's correct.

Q. Mr. Worley, are you aware of an instance, any instance wherein the City Council has approved development of property notwithstanding an open space designation on that property?

A. I'm aware of only one instance in which they have done so.

Q. Is that Jutland Canyon?

A. Yes.

Q. And I believe you testified that you're aware of one instance where you reached the opposite interpretation; is that not correct, that is, a rejection by the City Council based --

A. There was one instance within the last year in which I represented a client in which the subdivision map was denied basically because the property was designated as open space on the community plan.

Q. From those instances, you have concluded that the City Council in this particular context would interpret that no use of the property in
[98] accordance with the underlying zoning is consistent with open space?

A. Could you ask the question again?

Q. Well, I believe you testified that your interpretation of the Subdivision Map Act and the State Planning Act requires consistency with open space or, in the converse, it would compel a rejection of the proposed construction or the subdivision map?

A. If it were inconsistent with the open space plan, that's my interpretation.

Q. Therefore, do I understand your testimony in the context of this particular property wherein you are asked, "Would you have advised this plaintiff not to pursue a project to be granted or denied by the City for building on the property?" To mean that you feel the City Council would necessarily interpret any such development as being inconsistent with open space?

A. It would most likely do so, especially if it didn't want the property developed.

MR. SUMPTION: I have no further questions, your Honor.

REDIRECT EXAMINATION

BY MR. GOEBEL:

Q. Mr. Worley, you referred to the Jutland Canyon Project. Were there any factors present there which you have considered to be persuasive in causing the Council to approve the project even though it was designated for open space?

[99] A. I believe so. I was not personally involved in that project, but I do believe that the particular community plan designation has an express alternative land use and that either park or open space or this alternative residential land use by the terms of the community plan itself would be deemed to be consistent with the plan, and I believe that the Council used that alternative in justifying it, but I also am aware that that particular project is still in litigation and has not been finally approved -- has been challenged in the court.

. . . .

Excerpts from testimony of **A. Lee Griner**:
(called as witness by plaintiff)

[108] THE WITNESS: My name is A. Lee Griner, G-r-i-n-e-r.

DIRECT EXAMINATION

BY MR. GOEBEL:

Q. What is your current residence address, please?

A. 86712 Aries Street in La Mesa.

Q. Are you presently employed?

A. I'm part-time self-employed. I'm -- Excuse me.

Q. What trade or occupation?

A. Consultant and foreman, ranch development and natural resource conservation.

[109] Q. Briefly, what has been your employment history?

A. I worked about 28 years for the Soil Conservation Service of the U.S. Department of Agriculture since 1956 in San Diego County.

Q. Starting in 1957, could you briefly describe the nature of your assignments with the Soil Conservation Service?

A. The work was primarily as a consultant with private land owners recommending crops that could be grown on certain types of soil, the type of treatment that would be necessary to be successful with each undertaking, the type of irrigation to carry out irrigation techniques necessary dependent on the quality of water, things of this nature.

Q. Did this take you to all parts of San Diego County?

A. Yes.

Q. And into all types of agriculture regularly conducted in San Diego County?

A. Yes.

Q. And I take it you were employed by the Government, and the Government paid for your advising private property owners; is that right?

A. Yes. The Soil Conservation Service worked through Resource Conservation Districts which are legal subdivisions of the county in which they're organized.

Q. Okay. Now, since your retirement from work with the Soil Conservation Service, what have you been doing?

[110] A. I have been doing consulting work with some ranches in San Diego County, with a couple in Baja California. I've been doing some work for the Department of Agriculture in Mexico in Baja California. I have done some consulting work with some engineering firms in the County and also with some departments of County Government.

A. And your work with these private clients, is it similar to the type of service that you provided when you were employed with the Soil Conservation Service?

A. Yes, sir.

Q. Okay. Can you give the Court a brief synopsis of your formal educational background?

A. I got a degree in -- Bachelor's Degree in Range Management and Wildlife Management from Utah State University, School of Forestry in 1937.

Q. Since that time, have you participated in any continuing education programs in the area of soil agriculture and agriculture management?

A. Yes. The Soil Conservation Service had a very good ongoing training program, usually one or two training sessions each year from one to two weeks in duration. Since about 1955, I directed some of these training sessions.

Q. Are you the -- a member of any professional societies in your area of specialty?

A. I belong to the Soil Conservation Society, the Society for Range Management, and the California Section of the American Society of Agronomy.

[111] Q. Now, the property which we're concerned with in this lawsuit is property located west of Interstate 5. I'm indicating on Plaintiff's Exhibit 1 and south of Carmel Valley Road in the area generally known as Sorrento Valley. Are you familiar with that property?

A. Yes. I was out on it.

Q. Now, have you conducted a study to determine the feasibility of utilizing that subject property for agricultural purposes?

A. Yes, I have.

Q. How did you proceed with that investigation?

A. I got some of the literature that was available, primarily an original soil survey that was made by soil scientists in the old Coastal Soil Conservation District. This was done in about 1950 through 1952. I reviewed their recommendations and their classifications of the soil in that area. I reviewed the final soils mapping that was one in cooperation with the County of San Diego for publication purposes, and that was finished in about 1970. I reviewed the literature on the types of plants that would grow under certain conditions of salinity.

Q. Aside from reviewing the written literature, what other steps did you take in your investigation?

A. I had the Environmental Engineering Laboratory go out with us to the site and take soil tests in four different places.

[112] Q. And did you supervise the taking and selection of these locations?

A. I supervised selection of the locations and depth at which the samples were taken.

Q. And was this sampling technique consistent with -- the technique consistent with the techniques used by the Soil Conservation Service?

A. Yes. Both outfits used what's called a technique 60 of the United States Salinity Laboratory.

Q. Okay. After you had visited the site and taken the -- supervised the taking of the samples, what did you do next?

A. I reviewed the samples and reevaluated them on the basis of what possible plants could go there.

Q. Now, I understand you were at the site. Can you describe for the Court in terms of your specialty the physical condition of the site, that is, the present agronomy of the subject property?

A. The site shows no evidence of ever having been used for any agricultural purpose other than probably some grazing or pasturing. I'm sure there's never been a tillage tool on it, because as dry as it is this year when we were out there, there was no part of it that's dry enough that one can plow or disc or harrow or otherwise till. The areas that show bare on the map over there are primarily salt pans, areas in which there is no vegatation [*sic*] growing. Areas of different shades of brown are occupied by a small variety of highly salt tolerant plants.

[113] THE COURT: What?

THE COURT REPORTER: Salt tolerant plants.

THE WITNESS: Then up in the northwest areas where there's a continuing of blue, this is the area that is occupied more or less regularly by tidal waters and areas that show fingers of broad dark-colored lines or tidal channels that have water where the tide comes in.

BY MR. GOEBEL:

Q. Well, have you obtained the results of the -- Strike that.

Can you describe the nature of the vegetation that you found presently on the property?

A. Yes. It's primarily plants like pickle weed and alkali heath, desert salt bush, salt grass, one or two other highly salt tolerant plants. I didn't make a full catalog because in reviewing the literature, there is some 60-odd plants that have been found and identified in that general vicinity.

Q. Based on your experience of the vegetation that you found on the subject property, does it have any economic utility for grazing purposes?

A. Very little. I would estimate that in the normal year that it would take from 40 to 60 acres to provide enough forage for one cow for one month.

[114] Q. Now, have you obtained the results of the soil test that you supervised?

A. Yes, sir.

Q. What, in general, was the indication of those tests as it relates to viability of the property for agricultural purposes?

A. Extremely high salinity. We had tests made at four sites. One test was simply a surface inch of soil on which white residues existed. This showed an electrical conductivity of 70,000 millimoles which is extremely high when one considers that it's generally recommended that soils higher than 16 millimoles and soil conductivity are unsuitable for any type of economic agriculture without extensive and somewhat artificial land reclamation.

The best soil was -- or the best sample was at a site, I might say, over in -- toward the southwest corner on the -- I'm sorry -- on the southeast corner on the east side of the dike that was put in there when the sewer line was put in. This is an area that I interpreted to be relatively, if not completely, free of tidal action especially since the dike has been put in. The results showed 29 millimoles and was the best soil sample or the best test from that sample, and this at a depth of 12 inches. At six inches, the results were a little bit higher, I think around 14, and at 18 inches depth it was approximately 32.

[115] Q. When you refer to the dike, you're referring to the area of the soil line that shows as a light color on Plantiff's Exhibit 1?

A. Yes, right.

Q. And I take it that that is raised in elevation over the surrounding property?

A. Yes. It's an artificial dike that I presume had to be put in to carry the traffic when the sewer line was put in because you can see extensive sampling of gravel that shows out on the toe of the slope.

Q. The last sample you described was east of that dike?

A. Yes.

Q. Was that near the south or northeast part of the property?

A. It was closer to the north.

Q. Okay. Now, based upon your investigation and upon your years of experience in the field, in your professional opinion, could the subject property be utilized for any economic agricultural purpose?

A. Not for any economic agricultural purpose.

Q. And are there any, in your judgment, any economic means of rehabilitating the property so that it could be utilized for agricultural purposes?

A. Not any means that would -- whereby one could regain their investment let alone make a profit.

MR. GOEBEL: No further questions.

Excerpts from testimony of **William Rick**:
(called as witness by the plaintiff)

[121] Q. And your occupation?

A. Consulting civil engineer and planner.

. . . .

[123] Q. Were you retained to conduct an investigation of the feasibility of development on the subject property?

A. Yes.

Q. How did you proceed with that investigation?

A. The first step, of course, in any job of this kind is to visit the property and to assemble as much information of record as one possibly can. I'm sure your record has shown the descriptions of the property, [124] but the areas of investigation, of course, deal with the service utilities and the -- the services available and needed by the project and the physical characteristics of the property itself and the area in which it is situated.

Now, you can further divide the investigation as to -- and utilities, of course, is the first question, the availability of water service, and we found that the property was well served by existing water mains and by existing service. Of course, we're dealing in the charge upon us to investigate the property as it was situated in early 1972, and my answers will deal in that context.

The next question would, of course, be sewage disposal potential, and we found that the property was well served by sewer service by the City of San Diego. The property being owned by the Gas & Electric Company, we were satisfied that power and gas facilities were available.

We asked the owner to employ soil engineering consultants who made an investigation and reported to us that under certain conditions of handling the property, it was suitable for the construction of an industrial development similar to that which had occurred in the southeast. We investigated the flood control situation, the drainage, and found that under the criteria of the City of 1973, that the property could be developed. Having made that investigation, we realized -- and together with the soil investigation, knew that the project area would

[125] have to be raised above its natural condition, and we know that the same owner owns property north of Carmel Valley Road, and made the assumption, which we felt valid, and did determine that sufficient soil was available from the northerly property to be moved across and to create the working areas south of Carmel Valley Road.

So we satisfied ourselves generally that the physical parameters, the physical conditions, could all -- and demands on development could all be met. So then the investigation had to determine as to what public policy would have permitted or seemingly permitted in 1972 as to a land use, and a look at the general plan and progress guide and general plan for the City of San Diego makes -- reveals it clearly that it was the intent of the City of San Diego that the property in the main should be developed for industrial purposes. The progress guide indicates an extension of Sorrento Valley Road basically in a northwesterly direction, generally parallel over the sewer fill that's been made reference to earlier.

Q. When you refer to the progress guide and general plan, you're referring in part to Plaintiff's Exhibit 9 in evidence; is that right?

A. That's correct.

Q. And that shows a designation for the subject property?

A. Yes. That designation is colored blue and under the category of industrial in the legend.

[126] Q. Did you investigate any other land use control status with the --

A. Of course, you'd like to know how firm, if possible, the commitment is, and so if you go back further to, say, to the County plan, while the County authority had no jurisdiction, but the County in 1967 indicated the same use for the property, so that this gives you a feeling of comfort in selecting or determining that the general plan designation was fairly well founded.

We considered other alternates. We considered them just to test them and see if they were more logical either in response to the physical situation or perhaps into market or public need, and it would be my -- Well, I might review those.

Q. Yes. Based on the information that you gathered, this factual background, then did you consider various alternatives for feasible development of the situation?

A. Yes.

Q. And what alternatives did you consider?

A. Going from the least to the highest, of course, doing nothing was not our charge, that is, so that the least productive consideration in terms of urbanization would be agriculture. Well, we did not have the testimony of the previous witness. We've had enough experience to -- I worked the coastal areas of San Diego County -- that we considered that the agricultural use of the property was probably inappropriate. We based this upon the observation of the plant materials and other
[127] experiences that we've had in the coastal areas, so we rejected that. It, of course, is not designated as agricultural on the general plan.

So then we considered the probability of residential use. While the general facilities are available, we did realize that in 1972 there was -- had been resistance to further residential construction in this part of the community, and that weighed in our thinking. In addition, we had a tendency to try to avoid placing residential construction in areas that are subject to inundation or in which you have to design so that structures themselves are above safe flood levels, but certain portions of the property are below. You add that to the fact that the property is bordered by a railroad, by industrial uses to the southeast and by a highway. It doesn't enjoy the advantages of view that say the mesa property might, and culminated in the fact that it's not in accordance with the general plan, then you reject the residential use.

Well, I think it's fair to examine something in between the industrial and residential classification generally known as recreation, commercial; that is, a multitude of possible uses. One would be a golf course, a recreation vehicle park, similar uses. Well, we dealt with a number of golf courses in the projects in which we've been the engineer, and it was apparent to us that in light of our experience that a golf course -- an effort to make a golf course on this property would be
[128] tenuous -- the results would be tenuous principally because a golf course must be well drained on the surface and in the subsurface. We would have to bring in about as much dirt to create a golf course in the area as we would have to build an industrial project, and we knew that other clients, principally the golf course at La Costa, which had been built in a low area with poor drainage suffered under considerable added expense and difficulty for a number of years, so the forecast and the prognosis for the physical operation of the gold [*sic*] course idea was not good.

Well, in addition -- In development, golf courses normally are a supplemental land use in that you try to create a golf course in the midst of a larger development in which the benefits of the golf course can be realized in the enhancement of land values whether they be commercial or residential in the properties that the developer owns around the golf course. Examples are at La Costa, Rancho Santa Fe, Rancho Bernardo, and the majority of privately developed golf courses. A free-standing golf course, that is, one in which it occupies the entire property owned by the owner of the golf course, is found more normally in public golf courses where the land, in effect, is not expected to show a return. Once again, however, if you refer back to the general plan which did not designate this property for commercial recreation, we considered the
[129] possibilities within the hundred and 200 acres, that one might place a motel, but if you examine the freeway intersection conditions between Mission Bay and Oceanside -- and we had worked on a number of those for the property owners at interchanges, we found, to my recollection, there was only one motel built just east or near and east of the Veterans Hospital in La Jolla, and we believe the reason that motel development has not been attractive is the proximity Mission Bay. Mission Bay is such a greater attraction than lower Penasquitos that there's little incentive for the considerable investment that this property does not have ready access to the beach. While it's within sight, it's not within walking distance as you find the motels in Mission Bay, so this tended to rule out that type of development. It's conceivable, and I certainly agree that a small recreation vehicle park might work. Those parks don't run to large sizes. Ten acres is a fairly good-sized one, and it's conceivable that that would be an economic use within the property. I don't really think that I'm qualified to discuss the economics of recreational vehicle parks; however, it's possible that 10 of the hundred and so acres of this property might be suitable. That generally is the gambit of uses.

Q. Okay. Then with the exception of the industrial in your analysis, you've ruled out the other alternative uses as being feasible?

A. From our experience in land planning and general engineering.
[130] You could do them physically, but in comparison and past projects, it seemed inappropriate and counter to the general plan designation.

Q. Then did you focus on the industrial possibility to determine whether it appeared to be feasible?

A. Yes. We prepared a plan for development and prepared a cost estimate for that development.

Q. Then based upon your investigation, what, in your opinion, was the highest and best use of the property in its condition just prior to June 1973?

A. We felt the highest and best uses were industrial on about 150 acres of it, and the balance should be devoted to an enlargement of the state park preserve.

Q. Then how did you -- You mentioned that you conducted a study on the industrial development in terms of feasibility from a practical and economic standpoint. How did you proceed with that detailed feasibility study?

A. Of course, the road system -- I've already talked about sewer and water, and those systems exist generlly down the spine of the property in reference to the exhibit.

Q. Plaintiff's 1?

A. Plaintiff's 1, it can be seen as a light line running generally from northwest to southeast, and that's the sewer fill that's been referred to previously. If you'll compare that photograph with the general plan, you'll note on the general plan a black line which is the northwesterly

. . . .

[135] developing would be the fact that it would be the situation that the development itself would have a need for some maintenance in that the silts generated upstream primarily on the east side of the highway, I-5, would tend to drop out, that is, would be deposited within the development. I don't view that as a major difficulty. It's a, in fact, simpler management problem is you have the property divided as large commercial properties, commercial or industrial in which there's a business responsibility than if it's divided in small pieces for individual residential responsibility or where this deposit is going to be made onto a golf course, and so we felt in light of our calculations and in light of work that we had done previously in Mission Valley that it was -- it would be a prudent and certainly normal development decision to construct an industrial park in a floodplain of this nature. We were untroubled by any adverse considerations.

Q. So that it appears that you've covered the physical aspects, the circulation, the utilities and the flood aspects. Did you give consideration to land use control aspects that might be involved with industrial development?

A. Yes. In dealing with -- In making decisions as to what's an appropriate land use, you must consider the public interest, and it was our judgment that the available industrial zones -- that the MIP zone is the appropriate one. That requires -- Well, it's an industrial park zone and
[136] that one should look forward to complying with the provisions of that zone, that is, it's one which controls the environmental considerations, noise, smoke, and view requires 25 percent of the individual's sight [*sic*] to be landscaped, and these are important considerations. We appreciated the fact that it would be well to enhance the view from the freeway to the west, so the plan that we considered asumes a removal of cut bank, relatively small cut bank on the west side of I-5 which obstructs the view of the freeway to the ocean. We felt in 1972 we had just secured a permit for similar work near Interstate 5. Further, the design -- we felt that it would be one that was reasonable to expect approval on, did not get out into the tidal areas, in fact, held back from that portion of the property.

Q. I take it then these were in the nature of concessions when you start to make the property attractive for obtaining the --

A. I think the principal factor is that the importance of employment opportunity in the San Diego area, as opposed to other potential uses for the land and its extension, is a logical extension to a rather well-done industrial park to the southeast.

Q. Now, Mr. Slayter yesterday told us about the influence of tidal action. Exhibit -- Plaintiff's 16 in evidence -- he testified that tidal action is limited to the area indicated there in greenish-blue. Then he also
[137] indicated that he had placed another line upon Plaintiff's 16 which is lime green and indicated "limit of development." Does that correspond to the area that you considered for trial development in your feasibility study?

A. Yes.

Q. So that you considered no industrial use of the subject property west of the lime green limiting line?

A. Correct.

Q. Then what would have been proposed for the use of the property to the west?

A. That it be left in its natural state and offered to the State of California to augment the Torrey Pines Park preserve.

Q. Mr. Rick, on Plaintiff's 1, I've put down the next overlay which we'll ask to be identifed as Plaintiff's 1-E. Would you approach the exhibit?

(Plaintiff's Exhibit No. 1-E was marked for identification.)

Does Plaintiff's 1-E illustrate the concept that you were approaching in determining the feasibility of the property for industrial development?

A. Yes.

Q. And would you then indicate for the Court on Plaintiff's 1-E the area contemplated for industrial development and the area contemplated to be reserved in the original state?

[138] A. The limits contemplated for industrial development are the westerly line of Freeway I-5 and its interchange at Carmel Valley Road; at the southeast, generally the line of the northwesterly extent of the industrial development shown on the exhibit as buildings in the photograph; then the southwesterly limit would be the line of the railroad right-of-way up to the line shown on the previous exhibit as a lime green line; then the westerly -- northwesterly limit is the continuation extent of the lime green line until it meets Carmel Valley, so --

Q. So that the boundary that we see between the green shading and the brown shading on Plaintiff's 1-E is substantially similar to the lime green line on Plaintiff's 9?

A. Yes.

Q. And then Plaintiff's 1-E also depicts the extension of Sorrento Valley Road through the property as you previously testified. Would you resume the stand?

THE COURT: Mr. Goebel, this is a convenient time for our morning recess. We'll be in recess for approximately 10 minutes.

(Recess.)

BY MR. GOEBEL:

Q. Mr. Rick, before the recess, we were talking about your feasibility study for a possible industrial development for this property. Did
[139] you perform, in general terms, cost estimates to determine the feasibility of a plan of this nature?

A. Yes. We tried to put those cost estimates back to mid-1973.

Q. What development cost per acre of usable land did you arrive at?

A. $24,000.

Q. In your opinion, is a development cost one which developers were willing and able to bear as of June 1973?

A. Yes.

Q. Now, that development cost estimate includes the cost of filling the land and providing the utilities and arriving at a manufactured lot?

A. Manufactured lot cost had a certain allowance for enhancing the -- for some public interest investment in the 77 acres to the west or at the channel entrance. It did not include the site development landscaping or the buildings themselves.

Q. But when you were indicating what the developers were able to bear --

A. So that I had a comparable figure or a figure comparable with other projects and other figures that we had experienced.

Q. In arriving at the net usable acre, is it considered that the owner of the subject property would have to give up any further use of the
[140] approximately 77 acres that you had indicated would be desirable to give to the state or otherwise preserve?

A. Correct.

Q. Then in your opinion, a development along the general lines as depicted on Plaintiff's Exhibit 1-E was economically feasible in June of 1973 and a reasonable period thereafter?

A. Yes.

Q. In your opinion, was there a reasonable probability of obtaining all necessary governmental approvals for such a development during that period of time?

A. I feel so.

. . . .

BY MR. GOEBEL:

[143] Q. Well, Mr. Rick, you've established previously in your testimony, as I understood it, that aside from industrial, in your judgment, based upon the physical characteristics of the property and the existing land use designations even in the before condition, no type -- no use other than industrial were feasible; is that right?

A. Correct. To use -- It's my opinion that to make an economic use of the property shown in brown on, I guess it's 1-E, which is the subject of the discussion, that the developer is going to have to alter the present land form significantly. It's -- That's the basis from which you start, and when you alter the land form significantly, you're tampering with the property in its natural state.

Q. Well, you would then agree that in the after condition as well as in the before condition, all forms of development other than industrial are ruled out?

A. Yes. They're ruled out in the before condition which I presume is the condition in which the open space designation does not apply -- rule out for a variety of reasons.

MR. SUMPTION: Object as far as the open space designation is concerned, the rules.

MR. GOEBE: [*sic*] He was just attempting to describe the before condition.

BY MR. GOEBEL:

[144] Q. Don't -- In your testimony, avoid discussion of the open space condition. Assume that the before condition is the condition that existed prior to June of 1973.

A. All right. In that condition, the assumption is that one may alter the property to accommodate the development under certain restraints which have been part of my previous testimony. Under those conditions, it's my conclusion that the proper use is for industrial purposes.

Q. And was it also your conclusion that any other form of development other than industrial was not feasible?

A. Inappropriate, not feasible.

Q. Now, was there anything to change your conclusion that all forms of development other than industrial were not feasible in the after condition; that is, after the property had been designated for open space?

A. No.

Q. So in the after condition, without regard to designation as open space, all forms of development other than industrial were not feasible?

A. Correct.

Q. Okay. Now, based upon your knowledge and experience in this field and upon the advice of counsel that you previously referred to, in your opinion, is industrial development of any nature feasible in the after condition, after condition being after the property had been designated

. . . .

CROSS-EXAMINATION

BY MR. SUMPTION:

[145] Q. Mr. Rick, could you tell me when you did the feasibility studies? Were they done at one time or over a period of time?

A. They were done over a period of time between, say, June of 1975 through December of 1975.

Q. Had you had occasion to do any studies with relation to the subject property prior to that date?

A. Not to the extent which we did in this instance.

Q. As I understand your testimony then, your studies were done in relation to two time periods, one in what we've been referring to as the before condition and one in the after?

[146] A. Correct.

Q. Did you take into consideration the underlying zoning of the property in both the before and the after condition?

A. Yes.

Q. What was the zoning in the before condition?

A. It consisted of two zones, one an agricultural designation and one an industrial designation comprising the total property.

Q. Each of those two zones would have been applied on some portion of the property?

A. It just happened that they were.

Q. Could you describe generally by direction or location.

A. Generally speaking, the southwest, to my recollection, the southwesterly portion of the property was designated industrial; and the northeasterly was agricultural.

Q. In your feasibility study as far as uses other than industrial, what portions of the property were you concerned with?

A. We generally -- I limited myself to the area designated as brown for the reasons that I previously stated of the general public interest, and I felt that the area shown on the exhibit in green precluded consideration of development in the area with a general need for some quid pro quo as far as securing necessary permits is concerned.

[147] Q. In other words, you're referring to Exhibit 1-E, are you not?

A. Yes, sir.

Q. In other words, for both of your feasibility studies, one for industrial use and one for any other potential use that you testified you considered, you based it on the configuration shown on Plaintiff's 1-E wherein a portion of the property designated in green to the northwest was more or less ruled out of consideration as far as actual development?

A. Yes. The securing of approvals from public agencies often depends on the willingness to provide some public betterment, in this case, enlargement of the Torrey Pines Park, and that opinion of mine comes from the fact that the area's affected, in part, by tidal action. It's a resource area of small value.

Q. Is that portion not referred to as the lagoon on --

A. Oh, there are various definitions of lagoon. I prefer to keep to the one that calls a lagoon one that has tidal water effect.

Q. Are you familiar with the terminology "estuary"?

A. I've used the term. Once again, I think you're -- my understanding of the term "estuary" is that it's a lagoon connected to the ocean, generally a salt water situation; whereas a lagoon is a lake, is a form of lagoon, and the terminology is a little looser, but once again, I don't

. . . .

land use today or in 1973 or whenever?

[152] A. I think it's called a progress guide; is it not?

Q. In connection with your feasibility studies, did you conclude or find that various portions of the property other than what's shown as the green area in Plaintiff's 1-E were also subject to inundation by water or flooding?

A. Yes; except for the higher grounds east of the present Sorrento Valley Road. That property in brown is subject to inundation for the reasons I pointed out, that is, you have a sand plug at the ocean outlet, and so when it rains --

Q. In fact, I believe you testified that that might create some sort of problem in connection with the feasibility of residential use?

A. Yes, I did.

Q. I believe, Mr. Rick, you mentioned a figure of 150 acres for industrial use, is that --

A. 135 is the figure. I stand corrected. I was going from memory and not with the exhibit in front of me.

Q. But what you were referring to is --

A. The area of brown, yes, sir.

Q. Thank you. Mr. Rick, were you, in connection with your feasibility study -- Have you testified before the City Planning Commission or City Council in connection with this proposition and your findings?

A. No, sir.

[153] Q. Have you conveyed the results of your studies to members of the Planning Department and staff?

A. No, sir.

Q. To your knowledge, has the plaintiff ever applied for permission to develop according to your feasibility studies?

A. Not to my knowledge.

MR. SUMPTION: I have no further questions, your Honor.

REDIRECT EXAMINATION

BY MR. GOEBEL:

Q. Mr. Rick, you referred to public betterments in respect to the area in green on Plaintiff's E-1, and I think you referred to some remedial work at the area of the plug and also the creation of a Least Tern nesting area. Did you include those public betterments within your cost estimates?

A. I included a sum of money representing what we felt was a reasonable contribution towards those betterments.

Q. Okay. Now, Mr. Sumption just asked you if the plaintiff has applied for development for the property, and based on the plan developed in your feasibility study. Now, you, in the course of dealing with clients, frequently represent the client before the public agencies, and you're without the benefit of counsel; isn't that right?

A. That's correct.

Q. And you're frequently in the position of advising

. . . .

[156] Q. Mr. Rick, on the basis of your professional experience, and assuming that the property was in the condition after June 19, 1973, as it had been designated as open space, would you have advised this property owner to spend the money necessary to go forward with an industrial development plan for the --

MR. SUMPTION: Your Honor, I'll object on the grounds of relevancy.

THE COURT: Overruled.

THE WITNESS: No.

BY MR. GOEBEL:

Q. What's the basis for your opinion?

A. Earlier -- Well, my work and recommendations, of course, must follow in light of some experience with the Code under which I'm working, the Municipal Code, and the Municipal Code, as I recall, is pretty specific in its definition of open space, and I think the words --

MR. SUMPTION: To the extent this witness is going to testify as to his interpretation of the Municipal Code, I'll object on the grounds that he's not qualified.

THE COURT: It's not being offered for his interpretation. It's being offered as a basis for his opinion that he would not have advised the plaintiff to proceed, so it's overruled.

[157] THE WITNESS: Once again, the recollection maybe is faulty, but I think it refers to land essentially in its natural condition or natural state, and as I previously testified, I believe, there is no economic use of the property which I felt could be made, whether the highest or the least, would not involve a significant change in the -- from the natural condition of the property. Hence, I feel that I could not have recommended that the owner or prospective owner expend the moneys necessary to pursue a plan in light of that definition.

MR. GOEBEL: No further questions, your Honor.

MR. SUMPTION: No further questions, your Honor.

EXAMINATION

BY THE COURT:

Q. Mr. Rick, I'm somewhat confused by one of your statements. Is it your opinion that the open space designation precludes, for example, a golf course?

A. No, not generally. Certainly not in other jurisdictions in which we've dealt. The thing that troubles me is the -- is the definition of open space that I find in the Code that requires it to be essentially in its natural condition, because to create a golf course on this property, you have to import a considerable amount of soil needed to raise it up above the obviously unsuitable natural soils.

Q. What distance are you referring to, sir? What would be required, three inches or 35 feet?

[158] A. No. Three to four feet, maybe five feet depending on the mounding, but once -- we considered in the before condition the potential of a golf course and its suitability and rejected in on economic grounds rather than practical grounds.

Q. I understand that. How much would you raise it if you were going to put an industrial park --

A. Raise it a minimum of four -- three to four and higher where the building pads are to go. I believe you might conceivably import a little less material for a golf course than you would an industrial park.

Q. And so your opinion is based on your premise that the Municipal Code precludes the bringing in of some three or four feet of unnatural soil?

A. In answer to the after condition, yes; yes, sir.

Q. You earlier tetified that, generally speaking, golf courses to be economically feasible, other than those erected or maintained by public agencies, are done so to assist the developer in selling or enhancing the property which surrounds the golf course; is that correct?

A. Yes. In effect, you are shifting your land basis to the surrounding property and reducing the land basis to the golf course, so the economic return requirement is less.

Q. There are, of course, a number of exceptions?

A. Oh, Singing Hills was an exception, but Singing Hills is now moving into development of surrounding lands.

Excerpts from testimony of **Joseph Gallagher**:
(called as witness by the plaintiff)

. . . .

[250] Q. Your business or occupation?

A. Real estate appraiser.

. . . .

[254] Q. Specifically, have you gained any experience in the area of utilization of land for golf courses?

A. I have.

. . . .

Q. Were you employed by the plaintiff in this matter to make an appraisal of the subject property?

A. I was.

Q. And you are familiar with the subject property being that property located west of Interstate 5 and south of Carmel Valley Road in the City of San Diego?

A. Yes.

. . . .

[261] Q. Mr. Gallagher, in giving your summary, you might summarize briefly the components of the assemblage and give an overall figure rather than going through each detail of it.

A. The critical area from the appraisal standpoint, in my judgment, represented the portion of the assembly from Carmel Valley Road south and between I-5 and the railroad right-of-way, and that area comprising approximately 255.10 acres was acquired from four entities including the City of San Diego itself. The total cost of the assembly was $1,775,146. The acquisition extended over the period of April to September of 1966.

Q. Okay. Now, you had -- were telling us how you proceeded to conduct your investigation. Have you completed, in general terms, the extent of your investigation?

[262] A. Well, there were many other steps taken, but I think that I outlined the more important of the basic steps between -- in arriving at the opinion that I have.

Q. Would you then define the term "highest and best use"?

A. I understand the term "highest and best use" to mean that it's the highest and best use of the land and that use -- it is that use which prudence dictates will, over a reasonably foreseeable period of time, produce for the typical owner the highest net return or benefits, thus reflecting the highest capital asset value and will generally at the same time preserve the utility of the property. It's also sometimes described as being the most profitable and likely use to which a property can be put.

Q. Okay. After your investigation, as you've detailed to us, did you form an opinion as to the highest and best use of the subject property in which we refer to as the before condition or that condition that existed with respect to the property prior to the actions of the City of San Diego in June of 1973?

A. Yes.

Q. What was that opinion?

A. In my opinion, the highest and best use of the appraised property in the before situation was that the majority of the property had the best use of being developed as a modern industrial park.

[263]. Q. What were the bases for reaching that opinion?

A. Among the more important reasons, in my opinion, were the following: First, that the City of San Diego general plan of 1990, adopted December 15th, 1967, indicated industrial use for almost all of the property; second, the January 1972 adopted revised general plan indicated industrial use for subject property; three, most of the land was zoned M-1-A, an industrial designation; four, the San Diego Gas & Electric Company itself assembled the appraised property by purchase for a proposed industrial use; five, part of the assemblage was a parcel purchased from the City of San Diego itself, that was zoned industrially at the time of acquisition; six, adjacent lands extending southerly from

the property from Sorrento Valley was zoned for industrial use; next, the trend of development in Sorrento Valley and southerly of the subject property was and is to industrial usage; in addition, our investigation indicated a strong demand among industrial users for locations in the vicinity of the subject property. Also, interviews with district developers indicated a strong demand for the subject property itself for industrial use had it been available. Next, feasibility studies by Rick Engineering Company indicated that industrial development for the appraised property was economically feasible. Also, the land is ideally situated with respect to access, availability of utilities and site prominence for industrial development. These were the major reasons. There are others of a minor nature, but these were the most important, in my judgment.

[264] Q. Then, now would you describe briefly your interpretation of the major approaches to valuation of real property and indicate which were applicable to this situation.

A. There are three primary approaches or appraisal approaches to value. These include what is called the market data approach; another is the cost approach; and the third basic approach is known as the income approach, and the underlying theory of all three approaches is the theory of substitution.

As an example, the market data approach, the underlying theory is that a prudent investor is not warranted in paying more for a given piece of property, everything else being equal, than he would for an equally desirable piece of property subject to the same influences. This is the approach that involves the research into other sales of comparable properties in the vicinity of the land being appraised.

Under the cost approach, the underlying theory is that one isn't warranted in paying more for an improved piece of property than he could go out and buy the land and construct an equally desirable improvement at today's cost.

I used -- Under the income approach, the same type of theory of substitution applies. In that one one would not be prudent in paying more for an income-producing piece of real estate that he could buy -- go out and buy a substitute piece that would offer the same type of return and the same kind of risk. The approaches that I felt were most applicable to this appraisal problem were first -- the primary one was the market data approach, the value indicated for subject property based

upon the sales of other properties having the same highest and best use, the same potential and located within the same area.

[265] I used a modified cost approach as a check on the value indicated by the market approach, and this modified cost approach involved the request of Rick Engineering Company to do a feasibility study about the potential development of the appraised property and the cost to bring it to a manufactured state. From this, a -- by residual process, a residual land value was arrived at as a check on the opinion produced by the market data approach.

As an additional check on the value indicated by the market data approach, I researched, as I've already testified, the assembly cost, the actual acquisition cost by the San Diego Gas & Electric Company in 1966, only seven years before the date of value, and applied the trends indicated by the sales of other properties during the intervening nine-year period to the original cost of the San Diego Gas & Electric Company feeling that there is no better indication of the value of an appraised piece of property than the price that may have been paid for it or the price at which it may have been sold. You can't find a more comparable situation.

[266] Q. Then have you arrived at an opinion as to the fair market value of the subject property for its highest and best use in the before condition, that is, in the condition that existed prior to the actions of the City in June 1973?

A. I have.

Q. What is the opinion?

A. $4,200,000.

Q. And briefly, upon what do you base that opinion then?

A. Well, I probably testified to some of the reasons, but as a brief summary, it was based upon an extensive review of comparable sales in the area, interviews with developers of industrial lands in the area, analysis of the trends and absorption rates of industrial properties in the general area. It was based upon the residual land process by having a -- not relying on just my own judgment, but obtaining the expertise of an entity such as Rick Engineering Company to actually work out the probable cost that would be involved in making the land usable for industrial purposes, the trending of the original --

Q. Just a moment. Let me stop you at the last point. We have in evidence here from Mr. Rick that his feasibility study determined that the development cost per acre to get the land to a mnaufactured [*sic*] state would be approximately $24,000. Is that information that you relied upon?

A. It was.

[267] Q. And is it your opinion that that development cost is a cost which persons in the market were willing and able to bear for that condition as of the date of value that you had reference to?

A. It was.

Q. Okay. Then you were proceeding into the trending.

A. I was merely adding that another reason for the opinion was the results produced by trending the original acquisiton [*sic*] costs forward to the date of value as a check on the opinion that I reached based on the market data approach to value. Those were the primary reasons.

Q. Have you also conducted an investigation in an attempt to determine the highest and best use of the property in the after condition, that is, the condition that existed after the actions of the City in June of 1973?

A. Yes, I did.

Q. How did you proceed with that investigation?

A. It was difficult. First, in trying to ascertain, subject to the open space policy designation, what uses the land could be put to, in connection with trying to reach a conclusion with reference to the after highest and best use, I secured various material published by the City on the subject trying to find a definition for the uses that land subject to an open policy designation could be used.

Included in that research was securing copies of what you have handed me as Exhibits 1 and 2 entitled "A Plan for the Preservation of Natural Parks for San Diego."

[268] Q. Excuse me, Mr. Gallagher. There's a "1" and "2" written on that booket, [*sic*] but I think the evidentiary designation is otherwise. Read the orange tag.

A. Correction. It's Plaintiff's Exhibits 10 and 11, and with reference to these publications, I was struck by some of the printed material within the books that helped, at least, for me to explain the difficulties of the problem I have been confronted by. As an example in the interrogatory portion at Page 1, there's a heading, open space -- attempt at definition. Under that, it reads:

> "Although definitions of 'open space' abound, clearly no one of them has yet attained universal acceptance, nor is this surprising for open space by its very nature resists explicit delineation. One of the more recognizable difficulties surely is that 'open space' means different things to different people for different reasons."

The publication also continues to a pertinent section, in my opinion, where it reads:

> "More recently, state legislature defined 'open space land' as 'any parcel or area of land or water which is essentially unimproved and devoted to an open space use.
>
> "The latter term 'open space use' is defined as 'the use of land for, one, public recreation; two, enjoyment of senic [*sic*] beauty; three, conservation or use of natural resources; or four, production of food or fiber."

[269] Now, those categories, as I read them, only set up one productive potential use for a landowner whose property has been classified as open space, and that's the production of food or fiber which is an agricultural type use, and I know that already in this case has appeared an agronomist who has stated that soild [*sic*] conditions within the subject property are such that an agricultural use would be practically eliminated. This certainly supports the conclusion that I had reached from my own numerous investigations of the property with the high saline content of the land and the fact that flooding conditions exist at times, and in addition, even if the soil conditions were such that if filled, you then could support an agricultural use, the cost of that filling in order to cure the flood problem, in my judgment, would eliminate agricultural uses as being economic.

Also, I received from yourself and Mr. Worley, I believe, who has previously testified, the legal opinion that any subdivision would have to be consistent with an open space designation. Before arriving at a conclusion, I also considered the possibility of golf course usage of the appraised property. I related my own personal experience in both

appraising and being involved with the open space of a golf course, but in addition, interviewed Mr. Ted Vallis, V-a-l-l-i-s, who is the founder and president of Golf Course Inns of America as well as International Golf -- I better get that name correct -- Golf Inns International. This gentleman is operating the corporation -- owns and operates three golf courses here in Southern California, the closest one being Whispering Palms about two miles north of the appraised property as well as golf courses throughout portions of Europe. In connection with that interview, Mr. Vallis accompanied us down to look at the property, and the bottom line of his judgment was that even if filled, he wouldn't take the appraised property as a gift for golf course usage, and he had numerous reasons for it which have been supported by our own findings.

[270] First, we're dealing with a gross usage area of approximately 135 acres that would be available for a good recreation course, and in his judgment, even if the land were adaptable, it would be very tight by the time one set aside areas for tennis courts, the club house, and the other sporting facilities, but more important were two elements that he was -- he forcefully brought to our attention of the 63 courses located in San Diego County, 24 of them would be in direct competition, in his judgment, with any kind of a golf course development on the subject property. Of those 63, at the present time only five are either breaking even or making any money of any kind. These included such courses as Cottonwood, Singing Hills, Stardust, Pala Mesa and Whispering Palms, his own golf course. When queried on why this was the case, why the ones that he mentioned were making money in contrast to the other courses, he quoted several reasons as an example. The cost data as compared with these -- said another way, the courses that were making money were courses built many, many years ago. Singing Hills was a prime example, in his mind. When that course was developed, land cost out there was in a nominal $200, $400 an acre. It cost about $6,000 a hole to produce the course that he estimated the maximum cost when it was built at $250,000. Yet to produce the same kind of course today at Singing Hills would be about two million five. In support of that judgment, he mentioned the fact that nine holes were added at La Costa not too long ago at a cost of $100,000 per hole. A course in Oceanside is not quite fininshed, [*sic*] and it already has cost over $55,000 a hole, and they still have many things to do on it, but these --

[271] Another, of course, most important fact was that even if filled, in his judgment, the saline content of the overlying soil conditions were percolating through and making it almost impossible to support all of the planting and lawn area and things of that sort that would be required for a golf course, and there's a final judgment also -- this is from a golf course standpoint -- it would have to be judged fairly -- it doesn't have much character. It's flat land, and while grading could produce rolling greens and lower and higher elevations, it still would not have the attractive environment and topographical characteristics to make a desirable golf course.

[272] Q. Did you examine any other potential uses consistent with the open space designation?

A. Yes. I considered whether or not there was a potential for some minor uses, oh, such as an RV, vehicular park, and in my judgment, only a small area or small portion of the appraised property would be adaptable to that use even assuming the open space designation would permit it, and I cannot get -- have not been able to get a clear indication that it would, but even then, the grading that would be required, the filling that would be required and the fact that only a tiny segment of land, in my judgment, could be used, ruled that out as a possibility.

Q. Then based upon your investigation and your expert opinion, did you determine an opinion as to the highest and best use of the property in the after condition?

A. The only thing -- Yes, I have.

Q. What was it?

A. The only thing that I can conclude, the highest and best use of the property under the open space designation would be public ownership as open space with -- and, of course, this would produce no revenue to a landowner.

[273] Q. In your opinion, is the property marketable in the after condition?

A. No.

Q. Upon what do you base that opinion?

A. Primarily on the fact that an investor would be -- would be able to obtain, in my opinion, no clear-cut prediction -- he couldn't arrive at a clear-cut prediction nor could it be indicated by any of the sources that an informed purchaser would go to that -- would indicate that he could go ahead and produce it in any fashion that would produce income on his investment.

Q. Have you attempted to confirm this opinion?

A. Yes, I have, both in referring to the opinions of witnesses who have previously testified in this case, reading depositions of governmental officials that have been -- whose depositions were taken prior to the start of the trial, my own research into the subject, the examination and reading of the open space designation definitions -- those were some of the reasons:

Q. Have you also consulted with possibly purchasers?

A. Yes. Several of the developers of the industrial land within the area were interviewed about whether or not they would invest in the subject property subject to the open space designation, and again, the answer is that they wouldn't touch it, not knowing what they could do with it.

[274] Q. Again based on the opinion as to the highest and best use of the property, do you have an opinion as to its fair market value in the after condition?

A. I do.

Q. What was that?

A. I feel that in view of the limited potential uses that remain to the property, that it can't have more than nominal value. The nominal value that I assigned is somewhat arbitrary in -- $161,000, which is the equivalent of $1,000 per acre for the gross usable portion, and even this is based on the fact that within my appraisal experience I found lands out in remote areas of the desert that don't have any immediate or near term potential use, yet there are investors or purchasers in the marketplace who will still pay a nominal value for that type of land.

MR. GOEBEL: Okay. No further questions.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. SUMPTION:

Q. Mr. Gallagher, you restified, [*sic*] I believe, that it was your opinion prior to June of 1973, the majority of the property had a best use for a modern industrial park; is that not correct?

A. Yes, sir.

Q. Would you indicate what portion you're referring to

. . . .

general plan?

[276] A. I don't recall it at this moment.

Pardon me. Before -- I just want to see whether I do have that date with me.

The question was what, again, just --

Q. Whether you're aware of the date for implementation of the City of San Diego general plan?

A. I don't find it at the moment.

Q. Well, are you aware that there was a date of implementation sometime off in the future?

A. Yes. I'm sure that there was.

Q. Mr. Gallagher, you also indicated, I believe, in your testimony that you secured various City documents in order to assist you in determining what the property may be used for in its after condition, that is, after June of 1973. One of those documents you referred to was the open space booklet that's marked for identification as Plaintiff's Nos. 10 and 11; is that not correct?

A. That's correct.

Q. Are you aware of any legal interpretation as to the effect of designating property open space in a general plan that has been given by the City Attorney's office for the City of San Diego?

A. No, I'm not.

Q. Are you aware of any application for the use of this particular property, that is, application to the City?

[277] A. Well, I do in one fashion because it was known when the property was acquired from the -- a portion of the property was acquired from the City of San Diego that it was being acquired at that time as a potential site for a nuclear power plant.

Q. But are you aware of any actual application for use of this parcel of property, subject property?

A. Not of formal application, no.

Q. In fact, doesn't Plaintiff's Exhibit 11 have language in the test that would allow use for a nuclear power plant?

A. I don't recall that.

Q. Would that have any effect on your opinion of value in either the before or after condition if -- Well, strike that.

Would it have any effect on your opinion in the after condition if it were a fact that the open space plan provides for use as a nuclear power plant?

A. It could have if -- Well, it could have.

Q. Did you consider what effects it may have?

A. No.

Q. Mr. Gallagher, I believe you said you relied on opinions from attorneys including Mr. Goebel and Mr. Don Worley as far as their interpretation of the effect of designating property open space in a general plan; is that not correct:

[278] A. That's correct.

Q. Did you do any studies on your own insofar as the likelihood of the City allowing a use in accordance with the underlying zoning subsequent to its applying the open space designation on the subject property?

A. Yes.

Q. What were those studies?

A. Well, one example would be in discussing potential golf course usage with Mr. Vallis, he mentioned the fact that he was generally familiar with two instances where golf course usage was proposed within land that had an open space designation. One was in the -- as I recall, in the vicinity of Escondido, and the other was in San Diego County, and according to his information, neither one of them were successful in getting those uses through under the open space element.

Q. Theses were jurisdictions other than the City of San Diego.

A. Yes, uh-huh.

Q. I believe you indicated, also, Mr. Gallagher, that other documents you referred to were depositions of certain city employees in this case?

A. Correct.

Q. Did you read the deposition of James Goff?

A. I'm sure I did.

Q. Can you recall anything in that deposition that would lend support to your opinion that the City would not allow a use for the subject property in accordance with the underlying zoning?

[279] A. You better give me the first part of that question, if you will, please.

Q. In your review of Mr. Goff's desposition, do you recall whether there was anything in that deposition that would lend support to your apparent ultimate conclusion that the City would not allow any use for the subject property in accordance with its underlying zoning?

A. I don't recall at this moment whether there was or was not. It seems to me though that he did -- did talk -- or in response to some questions -- I just recall indistinctly at this time.

Q. Do you recall, in fact, that in Mr. Goff's deposition he indicated that an open space designation and industrial underlying zoning were not inconsistent?

A. I recall now that you've referred my memory that there was a statement of that nature.

Q. Do you recall his interpretation as to why he so concluded?

A. No, I don't.

Q. Do you recall him stating that the open space designation is not zoning, per se?

A. It seems to me that I do.

Q. Do you recall anything in any of the other depositions that you looked at that would lend support -- insofar as depositions of City employees that would lend support to your opinion or conclusion that the City of San Diego would not allow use of the property in accordance with its underlying zoning?

[280] A. I don't recall any specific ones at this moment. I would have to review them, but I recall that the impression I got that was supported by the balance of the research is that it's a pretty muddy area, and as I've testified, that no one investing in the property could, with any certainty, base a purchase price on what he was probably going to be permitted to do with the land under the open space designation.

Q. Now, the latter part of your statement is something that you formed a conclusion on; is that correct? That didn't come from testimony in depositions of City employees.

A. Well, the first part of my response certainly did. I had the impression from reading the multitude of depositions that it was certainly not a clear-out situation.

MR. SUMPTION: I have no further questions of this witness, your Honor.

THE COURT: Any redirect?

MR. GOEBEL: Yes.

. . . .

BY MR. GOEBEL:

[284] Q. Mr. Gallagher, have you reviewed the open space plan, Plaintiff's 10 and 11 for any reference to possible use of this subject property for a nuclear power plant?

A. I have.

Q. And have you located a reference to that effect?

[285] A. I have.

Q. What does that reference state and where is it found?

A. It's found on -- It's the last paragraph on Page 24 of the publication, "A PLan for the Preservation of Natural Parks for San Diego," and it reads:

> "As in the Tia Juana River Valley subsystem, the San Diego Gas & Electric Company has a large 240-acre ownership which it intends to utilize as the location of a nuclear power plant sometime in the 1980's. Again, such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem; however, a number of approvals and clearances must be obtained prior to the plant's construction becoming a reality."

Q. Okay. I think counsel will stipulate that it's found in Plaintiff's 11 and not in Plaintiff's 10. We made a reference to Page 24, and --

THE COURT: Last paragraph of Page 24?

MR. SUMPTION: Yes. That's correct.

BY MR. GOEBEL:

Q. Now, Mr. Gallagher, does that reference that you've just read affect your opinion of the highest and best use and value of the property in the after condition?

A. No.

[286] Q. And why not?

A. Because it's my understanding that the -- that language resulted from meetings between the members of the San Diego Gas & Electric Company and City Planning, but at the time the language was created, only a portion of the property was designated as open space, approximately the northerly half. The southerly portion was not, and it was mutually understood at that time that -- and the language was based on the understanding that if a nuclear power plant would go in, it would go in on the land that was not designated as open space.

Since that time, the entire property has been desiganted as open space which is an entirely different situation, and based on what has happened, the problems of constructing and getting approvals for other power plants like San Onofre and other areas, and that, combined with the fact that the total property is designated open space as of the date of value in the after situation, and based on the qualifying phrases that even under the best circumstances a number of approvals and clearances would have to be obtained, I just don't think that it would be reasonably probable to assume that under these set of circumstances that a nuclear power plant could be constructed on the subject property, and as the appraiser is constantly dealing with reasonable probabilities, the facts and influences line up, in my judgment, hard on the negative side.

. . . .

EXAMINATION

BY THE COURT:

[290] Q. Mr. Gallagher, you testified in your opinion the highest and best use of the subject property in its after condition was public ownership; is that correct?

A. Yes, your Honor.

. . . .

Exerpts from testimony of **James Goff**:
(called as witness by defendant)

. . . .

[333] THE COURT: The question, sir, is whether the open space designation is a zone.

THE WITNESS: It is not a zone as I would understand it under the Municipal Code as it applies to development regulations in the City of San Diego.

BY MR. SUMPTION:

Q. So that, in effect, if we have a situation where there is a piece of property such as the subject property designated as open space in the plan that I've referred to, and there is, in addition, a zone such as M-1-A or A-110 or whatever that has been applied on the property, would it be your interpretation that those two things are not inconsistent with one another?

A. That's correct, I would not judge them as being inconsistent.

Q. If the plaintiff were to apply for some sort of permission to build on the subject property in accordance with its underlying zoning, would your department recommend against such application on the sole basis that it's been designated for open space?

MR. GOEBEL: Objection. It calls for speculation on the part of the witness, and there's no proper foundation.

THE COURT: What is missing in the foundation, Mr. Goebel?

MR. GOEBEL: May we have the question back?

THE COURT: Read the question.

. . . .

[337] THE COURT: Yes, but all that Mr. Sumption is endeavoring to draw out is what recommendation would go to the City Council if and when he brings a witness in from the City Council or the Planning Commission to ask what they would do. That's something again. Right now, he's inquiring as to what -- that is, would there be a recommendation

against it solely on that ground. I believe the question is proper. Moreover, I have a further question that I will ask as soon as he answers this one.

You may answer the question if you remember it now.

THE WITNESS: My understanding of the question is, would we recommend against a development proposal in accordance with the underlying zoning solely because there was an open space designation on that particular property, and the answer is no.

THE COURT: That perhaps obviates my question, but the question that I would have asked otherwise is, would it have been proper for your department to have recommended against it solely on that basis whether you would have or not, as I understand your function as a Planning Department.

THE WITNESS: If I understand your question, I personally would not feel that it would be proper to come to that conclusion.

. . . .

[341] MR. SUMPTION: I guess it really only has bearing on application from the standpoint of what their potential action at some later time would be. I guess ultimately to come back to that same question.

THE COURT: Then, Mr. Goebel, my remarks a moment ago are applicable. Why would it not be relevant for that purpose?

MR. GOEBEL: To show what their actions were likely to be at some future time?

THE COURT: Yes. You have brought before the Court evidence that your client has not applied for relief or for permits because -- because of the advice given your client that it would be fruitless to do so. Now Mr. Sumption is offering advice given to the City Council as to the purpose for open space to rebut that. Why would that not be relevant?

MR. GOEBEL: Well, everybody indicates that the -- Nobody can predict the action of the City Council, whether the City Council is going to follow the advice of the attorney or not, so I'm saying it's speculative at the very least.

THE COURT: But is not the opinion -- are not the opinions heretofore introduced speculative based on the information available to them, namely, what they remembered in No. 11, the discussions they've had with various prospective developers and the like, and now on the other side of that is what the City Council was told the purpose

. . . .

[343] If you now recall in general or specific terms any advice given to the Council on that date by Mr. Conrad, you may relate it.

THE WITNESS: In general, I remember the Deputy City Attorney advising the Council as a result of questions from the Council as to whether the adoption of the open space -- the plan for the preservation of open space would, in fact, deep-freeze the property, and the gist of the response from the City -- Deputy City Attorney was, no, that was not the case, that reasonable efforts to acquire this property were under way in connection with a pending or anticipated successful bond issue, but that the underlying zoning would have to be judged should someone desire to develop their property, and the kind of development would be related to the requirements and restrictions on that underlying zoning.

BY MR. SUMPTION:

Q. All right. Mr. Goff, subsequent to the failure of the September of 1973 ballot proposition for the open space bond, did you become aware of any alterations in the Community Development Department's open space acquisition program?

A. No, I did not, sir.

Q. Were you aware at any time subsequent to the failure of that bond issue that the Community Development Department removed some properties that had been designated for open space in the open space plan?

. . . .

[361] . . . It's customary in industrial uses, particularly of the type that are taking place further to the southeast in Sorrento Valley, to divide the property into smaller parcels that what B-1 is showing there, isn't it?

A. Given that situation, we probably would require a subdivision map in connection with a development proposal, yes, sir.

Q. And for any division of the property for purposes of, say, leasing or financing would require a subdivision map?

A. I believe that the answer is yes. There may be some technicality that I'm unaware of, but I think the answer generally is yes.

Q. In your position as Planning Director requires you to be familiar with the various legal requirements of the Government Code with respect to open space and also the Subdivision Map Act, doesn't it?

A. Yes, I would like to be reasonably conversant. I'm sure that I'm not in all respects, but --

Q. In fact, the provisions of the Subdivision Map Act are also administered to your department, right?

A. Well, they are processed through our department. We're not the only department that has a direct role in making recommendations on subdivision maps.

Q. I understand. We have had here testimony about your department in the area of general planning and also talked about it in the area of rezoning. Your department is also generally responsible for the operational aspects of processing subdivision maps, right?

[362] A. Yes, that's what I was intending to imply.

Q. And through the Subdivision Review Board, of which the Planning Department has a member and makes a recommendation, do you process the subdivision maps at the beginning level?

A. Yes, sir.

Q. And in the event of appeal, they go to the Planning Commission of the City of San Diego?

A. Yes, sir.

Q. So the Planning Department would be required to generate a recommendation on any subdivision map, right?

A. Well, the Subdivision Review Board, of which we are one of three members, yes, sir.

Q. But as to the land use planning features of the subdivision map, the Planning Department would be responsible?

A. Yes, but I think what you're talking about is the zoning that we would be more concerned with in terms of land use. I'm not really sure that I'm speaking the kind of answers that you're asking.

Q. The other two members of the Subdivision Review Board relate to matters unrelated to ones we're talking about here in court. You have traffic, and who is the other member?

A. Well, you have two members from the manager's -- under the manager's jurisdiction, but they would be concerned with not only traffic, but sewers, utilities, a whole host of additional factors.

[363] Q. Okay. I show you a provision of the Government Code, Section 66473.5 and ask you to review that.

A. Just this section right here?

Q. Yes.

A. All right.

Q. Now, that section states, in substance, that no local agency shall approve a map unless the legislative body shall find that the proposed subdivision is consistent with the general plan, right?

A. Yes, sir.

Q. Now, the open space element which we have before us here as Plaintiff's 10 and 11, the green book, is an element of the general plan, isn't it?

A. Yes, sir.

Q. So when we talk about the general plan in these various legal provisions, you understand that the general plan means, in part, the open space element?

A. Yes, sir.

Q. And when we're referring here to the proposed subdivision, you intend that to mean a proposed subdivision map such as we've discussed would be customarily required for industrial development on the subject property?

A. Yes, sir.

Q. Then would you read the following section, 66474.

[364] A. Okay.

Q. And that states, in pertinent part here that a legislative body of a city or county shall deny approval of a final or tentative subdivision map if it makes any of the following findings: That the proposed map is not consistent with applicable general and specific plans -- isn't that a fair statement of what it says on that subject?

A. In general, yes, sir.

Q. And that says, "Shall deny approval," correct?

A. Yes, sir.

Q. Is it your interpretation from that provision that that means that it is in the disjunctive, that is, that only one of those findings has to be made in order to require denial?

A. I believe that's the case. If it does not --

Q. Look at it again, if you need to.

A. Yes, it says, "If it makes any of the following."

Q. So then you would agree with -- Strike that.

You would generally interpret in the performance of your duties that the Government Code then not only permits but requires that a subdivision map be denied if the legislative body makes a finding that the subdivision is inconsistent with the general plan?

A. If they make a finding that it is inconsistent, yes, sir.

Q. And they're required to consider -- or, that is, they can just not refuse to address the subject. They're affirmatively required to address whether it's consistent?

[365] A. I believe the answer is yes. I'm not understanding the point you're making, but --

Q. Now, I ask you to refer to Section 66 -- excuse me, 65567. Would you review that to yourself, please.

A. I've read it.

Q. And that states that no building permit may be issued, no subdivision map approved, and no open space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open space plan; is that right?

A. Yes, sir.

Q. So again, you would view that -- from your interpretation, there would have to be an affirmative determination that the proposal was consistent with the -- not only the general plan, but the open space element of the general plan?

A. Yes, sir.

Q. Now, is your testimony then that an industrial development proposal which would contemplate a division of the property into more than four parcels, such as indicated on Exhibit 1-E, could, under any circumstances, be consistent with the open space designation?

A. I don't understand your question. You said if it's divided into four parcels as indicated, and I can't see -- there was something about a categorical conclusion.

[366] Q. Let me set the basis. I want you to be sure you understand the question.

You agreed with me previously, I think, that industrial development for a parcel this size would probably require a subdivision map?

A. Yes, sir.

Q. That's customarily required of four or more parcels?

A. Yes, sir.

Q. And from your experience, that would be the customary thing that would happen if a party wanted to develop this property for industrial purposes?

A. Yes, sir.

Q. So then my question was, assuming that that's the case, and assuming further that this property has been designated for open space as it was on June 19, 1973, are you then telling me that your department would not find any proposed industrial development consistent with the open space plan?

A. Well, the question suggests to me that it's a very conceivable possibility we would agree. That's my understanding of your question, and it would be hard for me to conclude that, but I would say in general I would imagine that an industrial development in that area would be consistent or could be very well consistent with the general plan and with the Torrey Pines Community Plan.

[367] Q. Well, could -- Can you define for me what you mean by consistent?

A. Something that we would find when we're reviewing the subdivision regulations that we were just looking at, that would put us in a position of recommending approval of a particular project that we would not conclude that the meaning construed from that ordinance language and applied to that particular project in that area would result in an inconsistency. I don't really know how to define it other than they're compatible. There must be other words that you can use, but they would be consistent.

Q. Well, isn't it a fact that most, if not all, industrial subdivisions that you received and reviewed in the Planning Department contemplate the building -- the building of buildings on each of the lots defined in the map?

A. I think generally so, but not without appropriate open space within the project itself which I would find would be one method of determining whether there was consistency.

Q. So if a large enough percentage of open space were reserved, you might find it to be consistent?

A. I don't know whether it might be a percentage. It might be in the nature of the design.

Q. To your knowledge, does the City have any single controlling definition on the subject of open space that's consistently applied?

[368] A. Well, I think there's a general definition of the meaning and intent of open space in the planning for the preservation of natural parks.

Q. Well, if I understood your testimony previously, you agreed with me that one of the things that was required of your department to

discharge its duties under the Government Code was to review any plan and determine if it was consistent with the open space plan?

A. That would be one of our charges, yes, sir.

Q. Now, when you conduct this process of review, do you have a single definition of open space that you consistently apply?

A. Well, we would be guided by the policy that's contained in that plan, the language that describes the intent and purpose of open space.

Q. Well, I understand that you would be guided by the policy and so forth, but is there any single definition of open space that you consistently apply?

A. I don't think that there is such a thing as a single definition. I think open space can be achieved in a number of different ways.

Q. Would you review --

A. Within the meaning particularly of that plan.

Q. Would you review the plan and see if you can locate the definition that you have reference to as being part of this plan?

[369] A. I believe the definition is indicated in here on Page 2, and it's underlined:

> "Any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

THE COURT: When you read, sir, would you mind reading a little slower?

THE WITNESS: I apologize. Should -- Should -- I guess I should read it again.

> "Any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

THE COURT: You've read from Exhibit 11, have you, sir? Or did you read from 10?

THE WITNESS: This is from the plan -- I don't know the number of it.

MR. GOEBEL: Plaintiff's 10.

THE COURT: Plaintiff's 10.

MR. GOEBEL: I'll highlight it in red.

THE WITNESS: This is the definition we've indicated for most purposes we would utilize. The report does have some other indications of open space that would also be considered, but this is perhaps the most simple definition of it that we've incorporated in the document.

BY MR. GOEBEL:

[370] Q. I've highlighted then in red the part that you've read into the record; is that right?

A. Yes, sir.

Q. Now, immediately above that, there's a definition that at least the plan represents as found in the City of San Diego Municipal Code; isn't that right?

A. Yes, sir.

Q. Do you subscribe to that one, also?

A. Yes, sir. I think the whole intent of the section in the report is to indicate that there are a number of different ways that I can define open space, and certainly that would be one that we would have to subscribe to.

Q. Well, in carrying out your charge to determine whether a particular subdivision map is consistent with the open space plan, do you apply the one that I've highlighted in red or the Code definition?

A. I would like to think that we would consider all of these.

Q. Well, would you read then the Code definition?

A. You're referring to this section right here?

Q. Yes.

A. "Open space land means any land or water area (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which, in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the progress guide and general plan for the City of San Diego as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

[371] Q. Let's highlight that in blue, if you would, just the part you read.

A. It's going to block it all out.

Q. You can read through that.

And you attempt to apply this definition in making your definitions, right?

A. Yes, sir.

Q. Now, do you consider that any industrial development on this portion of the subject property indicated in brown on Plaintiff's 1 across the way would leave the property primarily in its natural state?

A. I think there could be a design for industrial development on that property that would achieve essentially what's called for here, yes, sir. I haven't seen one, but I think that that's possible.

[372] Q. And do you think that that design would have the property with value for park and recreation purposes?

A. I think it could be either that or, as the definition indicates, complement the adjacent area for said purposes.

Q. In fact, the adoption of the open space element is not a static thing, is it?

A. I would assume over a period of time, that it would be periodically updated, yes, sir.

Q. Well, I guess I should be more precise in my question. In fact, once having adopted the open space element to the general plan, there falls upon the City a duty to bring its zoning into conformance with the open space element to the general plan; isn't that right?

A. We don't have any such thing as an open space zone that we could do what you're talking about.

Q. Again, I ask you to refer to the Government Code, and particularly Section 65860. Would you just review that to yourself?

A. Yes, sir.

Q. Okay, that provides, in substance, that County or City zoning ordinances shall be consistent with the general plan of the County or City by January 1, 1974, right?

A. Yes, sir.

Q. And the open space element is one aspect of the general plan, right?

[373] A. Yes, sir.

Q. And it further indicates that in the event a zoning ordinance becomes inconsistent with the general plan, the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan?

A. Yes, sir.

Q. Therefore, if we were to assume for a moment that the M-1-A zoning is inconsistent with the open space designation, there would be an affirmative duty on the part of the City to amend the zoning ordinance to bring it into compliance, correct?

A. If you made that assumption that there was that inconsistency, yes, sir.

Q. And, in fact, since the adoption of the open space element in June, 1973, the Planning Department has conducted mass rezonings of various communities of the City to bring the zoning into compliance with the open space element; isn't that right?

A. No, sir.

Q. Well, didn't, in fact, the college area undergo a rezoning which was initiated, in part at least, by the open space element to the general plan?

A. No, sir, I don't believe that's a fair characterization of the action. The action was an intent to make the development regulations, that is, the zoning, conform to the development proposals in a community plan, and very often, you'll find instances where there will be a preference for open space preservation in areas, but with the recognition that they require or there would be required steps that might not be within the purview of the City to execute, that there should be some alternative use for the property, and what we were doing to the State College area, as I recall, was merely making the underlying zoning consistent with those development proposals which were alternatives to acquisition and preservation or no development whatsoever, and it's a very common situation that we face. It's a particular example in the area that we're talking about here where there are proposals for open space, there are also alternatives for the appropriate backup zoning, so to speak.

[374] Q. Well, you're saying that in the Torrey Pines Community Plan there exist properties which, while being designated as possible open space, contain an alternative land use expressly indicate; is that right?

A. Yes, sir.

Q. The subject property is not one of those properties, is it?

A. A portion of the subject property is indicated in the Torrey Pines Community Plan for further valuation, yes, sir.

Q. But that language is not in the same form as the language that's used in the other parcels that you had reference to.

[375] A. I don't understand your question, sir.

Q. You have not designated any other parcels with that particular type of language, have you?

A. In the Torrey Pines plan, sir, I don't recall that we do, no, sir.

Q. In fact, in the Torrey Pines plan on those parcels that you have reference to, it says that if the property is not acquired for public purposes within 18 months, then the property owner may develop it to a certain specific residential density; isn't that right?

A. I recall that there is that stipulation added to that.

Q. But no stipulation or system limit is set with respect to the subject property?

A. The portion of the subject property is not even recommended for open space or industrial or whatever. It's indicated, as I stated, it's under -- it's an area for further study.

Q. And you're referring essentially to the designtion found at Page 94 of Defendant's Exhibit D?

A. In reference to the area for further study, yes, sir.

Q. The area shows in white, and it has the language "Future use under study"?

A. Yes, sir.

Q. What is your interpretation of the meaning of "Future use under study"?

[376] A. It means that the ultimate disposition of that in terms of recommendations as far as the City Council is concerned are awaiting various studies to give clues as to what would be appropriate uses in those areas. The property is in the industrial zone at the present time, but there is some consideration in the study for perhaps some alternative.

Q. Now, in fact, your department studied the subject property for approximately eight months prior to the actions of the City in June of 1973; isn't that right?

A. If you're referring to the recommendations on zoning which emanated from the City Council, I'm not sure how we scheduled it, but there was a study of that nature, yes, sir.

Q. And wasn't it the determination of the Operations Division of your department that the parcel shown as B on Plaintiff's Exhibit 1 should remain in the industrial zone?

A. Given the information that we had available at the time, yes, sir.

Q. And that action was ultimately taken by the Council on June 7 of 1973, right?

A. I believe so, sir.

Q. And then on June 19, 1973, another division of your department recommended that that very same property be designated for open space; isn't that right?

A. I believe that's correct, sir.

Q. And then in 1975, you're telling us that once again your department is recommending that there be more studies conducted on the parcel referred to as B on Plaintiff's 1?

[377] A. To undertake studies that were not undertaken in connection with the rezoning consideration, yes, sir.

Q. And are there any such studies in progress at this time?

A. It's my understanding that there are, but they're not within the purview of the City of San Diego.

Q. The City is not doing any studies at this time?

A. Not to my knowledge, sir.

. . . .

Exerpts from testimony of **Kenneth Klein**:
(called as witness by defendant)

. . . .

[382] Q. What was the ultimate action by the City Council with respect to the rezoning?

A. They concurred with both the department and the Planning Commission with respect to the rezoning which I've just outlined.

Q. Were you present, Mr. Klein, at the April 11, 1973 Planning Commission Hearing?

A. I believe so, yes.

Q. Do you recall whether or not representatives of the San Diego Gas & Electric Company appeared at that hearing?

A. I believe they did, yes.

Q. Do you recall whether a Mr. Frank DeVore representing the Gas & Electric Company was present at that hearing?

A. I have reviewed those minutes, and yes, he was present.

Q. Do you recall, Mr. Klein, whether or not Mr. DeVore responded to questions asked him by members of the Planning Commission with respect to the rezoning of this property?

A. Yes, he did.

Q. Do you recall the nature of those questions and Mr. DeVore's response?

A. I can recall, and my memory was refreshed by reading in the minutes that someone just before the vote was taken on the matter asked Mr. DeVore if this rezoning would have any effect on the Gas & Electric Company's plans, and Mr. DeVore responded that he felt it would not have any effect on the long-range plans of the development of this land.

[383] Q. Do you recall whether Mr. DeVore or anyone else representing the Gas & Electric Company at that hearing voiced any concern for use of the property for industrial purposes?

A. I don't recall -- in terms of the area that was rezoned?

Q. Yes.

A. I don't recall that, no.

Q. Do you recall whether any reference -- any similar reference was made to any other portion of the subject property?

A. I believe they did discuss the possibility of a power plant facility being placed on the other portion of the property that remained in the M-1-A or nestled into the hill or something of that nature was discussed at the time.

Q. Mr. Klein, are you generally familiar with uses that may be permitted through the vehicle of a conditional use permit?

A. Yes.

Q. Does the City of San Diego have specific uses that may be made for property regardless of the underlying zoning through this vehicle?

A. Yes.

[384] Q. Could you describe -- Strike that.

Have you made an attempt to determine whether any uses allowed by the conditional use permit might be reasonably made for the northerly portion of the subject property, and when I refer to the northerly portion, I mean generally to the north of the line that bisects the property east, in an east and west direction?

A. Yes, I think there are uses that are permitted under a conditional use permit that could lend themselves to this property.

Q. Would you tell us what those uses are, please?

A. Let me refer to my planning zone regulations. I will just enumerate some of the uses that would be conceivable under a use permit. Basically, in any zone, first of all, electric distribution and gas stations serving the immediate area, parking facilities -- I think this might be a pretty significant one because if adjacent industrial zoned property were developed, parking could be provided within the area that is in the A-110 zone or was rezoned A-110 under a conditional use permit. These would be uses that the permit could be granted by the zoning administrator.

Moving on, other uses that would be possible in this zone -- boarding kennels for dogs and cats and any agricultural, industrial or commerical zone, in this case both the industrial or the agricultural would qualify -- building structures and uses operated by a public utility. Under the present ownership, of course, they could come in for any use under this provision if they did remain the owner of the property. Private recreational facilities, golf courses, driving ranges, pitch-and-putt golf courses, minature golf courses, research, development and testing laboratories and facilities which would encompass broad range of scientific facilities or industrial research and development -- in addition, camping parks together with incidental facilities in any commerical or industrial zone except the SR and any agricultural or floodway zone -- these uses would be permitted.

I think this generally, in reviewing the conditional use permit, would be uses that can be considered for development of that portion that was placed in the agricultural zone.

[385] Q. Mr. Klein, do you recall whether or not at the hearings on the rezoning before the Planning Commission or the City Council, whether any representative of the Gas & Electric Company presented any evidence with regard to the economic feasibility of making use of the property in light of the recommendation for rezoning?

A. I do not recall any such evidence being submitted.

. . . .

THE COURT

SAN DIEGO, CALIFORNIA, WEDNESDAY, JANUARY 28, 1976, 10:00 A.M.

[411] THE COURT: Good morning, gentlemen. The Court has had an opportunity to go over the documents received in evidence and the cases that were cited during argument and also to review notes taken during the testimony.

The Court has concluded that the plaintiff has established by a preponderance of the evidence that there was a taking of the property pursuant to the authorities concerning inverse condemnation, and the Court therefore finds liability on the part of the defendant; accordingly, we are ready to proceed with the damage aspect of the case. I might comment that the case cited by the plaintiff with regard to the exhaustion of administrative remedies was somewhat less than persuasive in light of the fact that the Court took the liberty of going back and reading the case relied on, the *Ogo* (phonetic spelling) case. The *Ogo* case simply says that there is an exception to the exhaustion of administrative remedies doctrine when the aggrieved party can positively state what the administrative decision in his particular case would be. Now, if that's all we had, then we would logically determine in this case that by a preponderance of the evidence the opinions stated could lead the Court to the conclusion that those opinions are a statement by the plaintiff of what the administrative agency's decision would be; however, the case relied on was that of *Gastner vs. Mantern*
[412] *Company* (phonetic spelling), and when one reads that case, the language used therein was that by a long line of decisions, the Commission had made plain its views as to the law applicable to a situation similar to the one being litigated, and that therefore it would habe [*sic*] been an idle act to have asked for review by the Commission. The Court in the *Gastner* case held that the Court could not presume that the Commission, having adopted a particular rule or policy in like cases in the past, would necessarily have applied the same rule in the case at bar. Then they qualify it. The exhaustion of remedial procedure as laid down by the statute is required unless the petitioner can positively state that the Commission has declared what its ruling will be in the particular case, and in the *Gastner* case, the petitioner therein was unable to do that.

Typically, we find a situation where an Appellate Court in its decision has relied on an earlier decision which decision does not support the opinion of the Appellate Court. Nonetheless, looking at the other aspects of the *Ogo* case and the circumstances of this case, the Court still is of the opinion that that doctrine has been met.

MR. GOEBEL: I cited also the *Snead* case, and I think *Snead* raises the question of whether the doctrine is even applicable in this situation.

THE COURT: That's another aspect of the Court's reasoning for ruling as it has done, but I wanted to clarify your presentation of those cases in any event.

[413] MR. SUMPTION: Your Honor, I have two items that I would like to be heard on. One is perhaps some clarification of the extent of the Court's ruling, and the other is, I would like to be heard as far as proceeding immediately with the damage phase of the trial. I don't know if the Court prefers one before the other.

THE COURT: Whichever you prefer to present first, I'll hear you on.

MR. SUMPTION: Well, as far as the ruling is concerned, your Honor, by your statements, I take it that what you're saying is there has been established a taking as opposed to a damaging.

THE COURT: That's correct.

MR. SUMPTION: And also, you indicated the property -- and I assume from that you're referring to the property -- the subject property in its entirety rather than certain portions thereof --

THE COURT: That is also correct.

MR. SUMPTION: And also, I believe implicit in the Court's ruling would then be that the Court has rejected the defendant's contention that the appropriate remedy would be declaratory relief as opposed to money damages?

THE COURT: Yes, sir.

. . . .

EXHIBITS

Document	Page
Defendant's Exhibit G Memorandum to City Council, dated June 19, 1973	154
Plaintiff's Exhibit 11, Pages 1,2,10,24 "Plan for the Preservation of Natural Parks for San Diego	156
Plaintiff's Exhibit 22 Memorandum, dated June 27, 1972; Transcripts of Council Conference on Open Space, March 16, 1972	161
Plaintiff's Exhibit 22A Minutes of Council Meeting March 16, 1972	162

CITY of SAN DIEGO
MEMORANDUM

FILE NO.:

DATE: The Honorable Mayor and City Council

FROM: City Planning Commission

SUBJECT: Open Space Plan

The hearing at this time concerns a proposal to adopt an open space plan.

Section 65563 of the State Planning and Zoning Law declares that, "On or before June 30, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency, a local open-space plan for the comprehensive and long-range preservation of open-space plan for the comprehensive and long-range preservation of open-space land within its jurisdiction. . ." To meet this requirement, the department has prepared an open space plan described in the report, *A Plan for the Preservation of Natural Parks for San Diego.* This plan primarily emphasizes preservation of San Diego's stream canyons and valleys. Five major subsystems of City-wide significance are identified, along with nearly a score of community-related subsystems. In numerical terms, the total system projected encompasses approximately 51,000 acres, of which about 23,000 are already publicly owned. An additional 17,000 acres are designated for "limited development under zoning," while the remaining 11,000 acres are proposed for acquisition.

On May 16 and 23, 1973, the Planning Commission considered the proposed plan at a noticed public hearing. At the conclusion of the hearing, which is recorded on pages 320 through 324 of the Planning Commission minutes for 1973, the Commission voted 5-0 to approve and recommend adoption of the open space plan as represented by the report, *A Plan for the Preservation of Natural Parks for San Diego*, a report addendum, and Exhibit Maps "A" and "B". Opposition was essentially limited to a spokesman for the Penasquitos Corporation,

EXHIBIT "G"

who objected to the estimated acquisition acreages applied to certain properties.

James L. Goff
Planning Director

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EXHIBIT "G"

A PLAN FOR THE PRESERVATION OF NATURAL PARKS FOR SAN DIEGO

An Open Space Plan for San Diego City required by State Government Code, as amended by Chapter 251, Statutes of 1972:

65563. On or before June 30, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiciton. . . . . .

65564. Every local open-space plan shall contain an action program consisting of specific programs which the legislative body intends to pursue in implementing its open-space plan.

65566. Any action by a county or city which open-space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open-space plan.

65567. No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.

CITY PLANNING DEPARTMENT
GENERAL PLANNING SECTION
CITY ADMINISTRATION BUILDING
COMMUNITY CONCOURSE
SAN DIEGO, CALIFORNIA 92101
APRIL, 1973

Plaintiff's
EXHIBIT "11"

CHAPTER 1 - INTRODUCTION

By recent legislative enactment, the State of California has decreed that

> On or before June 30, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction.[1]

This Plan for the Preservation of Natural Parks in its entirety is intended to constitute a local open space plan for the City of San Diego. Following adoption by the Council, it will be submitted to the Secretary of the Resources Agency.

At the same time, this report is also intended to serve as one of a series of eight background reports on various of the elements that will collectively comprise the City's revised General Plan. The latter is scheduled to emerge from an extensive process of comprehensive review sometime in 1973.

OPEN SPACE - AN ATTEMPT AT DEFINITION

Although definitions of "open space" abound, clearly no one of them has yet attained universal acceptance. Nor is this surprising, for open space by its very nature resists explicit delineation. One of the more recognizable difficulties, surely, is that "open space means different things to different people for different reasons."[2]

As might be surmised, somewhat differing definitions of open space have been set forth in various legislative enactments. Under the Housing Act of 1961, open space land was defined as any undeveloped or predominantly undeveloped land in an urban area which has value

---

[1]Portion of Section 65563 of the *Government Code* as amended by Chapter 251, Statutes of 1972.

[2]California Legislature, *Joint Committee on Open Land Final Report*, Feb. 1970, p. 51.

Plaintiff's
EXHIBIT "11"

for (a) park and recreational purposes, (b) conservation of land and other resources, or (c) historic or scenic purposes.[3]

A 1959 California statute authorizing cities and counties to expend public funds for the acquisition of open space declared that:

> . . . an "open space" or "open area" is any place or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.[4]

More recently, state legislation defined "open-space land" as "any parcel or area of land or water which is essentially unimproved and devoted to an open space use . . . ."[5] The latter term, "open-space use", is defined as "the use of land for (1) public recreation, (2) enjoyment of scenic beauty, (3) conservation or use of natural resources, or (4) production of food or fiber."[6]

Within the City of San Diego Municipal Code, the following definition is found:

> "Open space land" means any land or water area:
>
> (1) which is primarily in its natural state and has value for park and recreation purposes, and
> (2) which, in the opinion of the City Council of the City,
> (a) conforms to the criteria established for open space land set forth in the "Progress Guide and General Plan for The City of San Diego" as amended, and

---

[3]U.S. Congress, *Housing Act of 1961*, Sec. 706, Public Law 87-70, 87th Cong., 1st Sess., 1961.

[4]California, *Government Code* (1972), Sec. 6954.

[5]California, *Government Code* (1972), Sec. 65560.

[6]*Ibid.*

Plaintiff's
EXHIBIT "11"

(b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources.[7]

For most purposes of this plan report it is desirable that open space bear a definition that is both simplified and encompassing. Consequently, as generally used hereafter, open space should be understood to mean *any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes.*

THE USES AND IMPORTANCE OF OPEN SPACE

The past two decades have witnessed a phenomenal upwelling of public interest in open space and its preservation. Accompanying this surge and heavily contributing to it has been a mass of published materials covering virtually all aspects of open space. So many of these materials have dealt so extensively with the uses and importance of open space that little needs be added here. Consequently, the discussion

. . . .

Recent changes in the State Subdivision Map Act should considerably strengthen the utility of the subdivision regulation process as a means of preserving open space. Most notably, Assembly Bill 1301, enacted in the 1971 legislative session and effective in March 1972, provides in part that

> A governing body of a city or county shall deny approval of a final or tentative subdivision map if it makes any of the following findings:
>
> (a) That the proposed map is not consistent with applicable general and specific plans.[9] . . . . . .

---

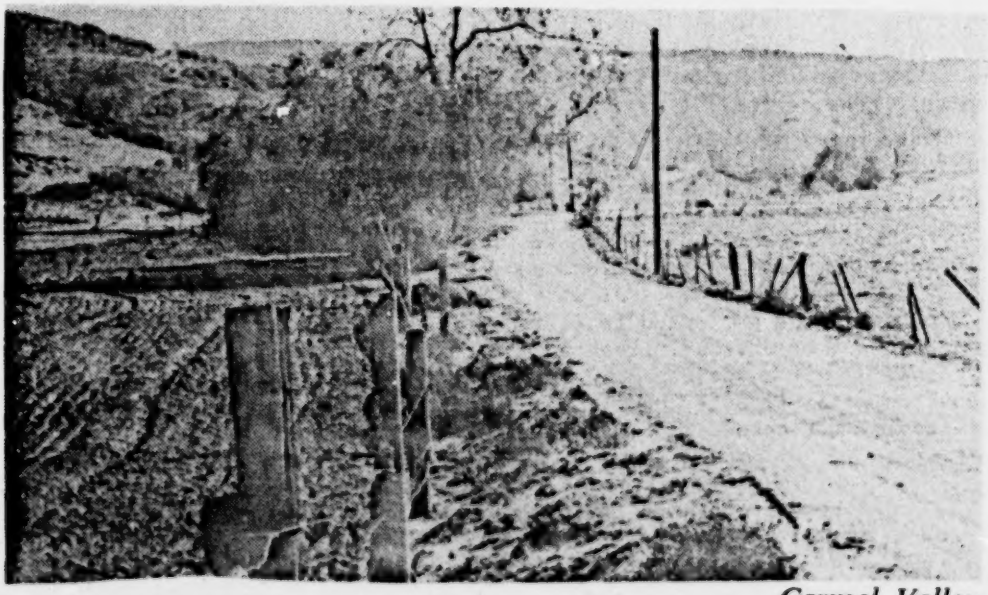
[7]San Diego Municipal Code, Sec. 61.0601.

[9]California, *Business and Professions Code* (1972), Sec. 11549.5.

As might be expected, the views from Black Mountain are outstanding and the views of it from surrounding lower areas add much to the place-identity of North City. Although the City has a 200 acre park site near the summit and owns an additional 90 acres nearby, it does not now own the summit itself. The City is proposing to acquire some 240 acres which include the higher areas and surrounding steep slopes.

LOS PENASQUITOS LAGOON-CARMEL VALLEY-McGONIGLE CANYON

Los Penasquitos Lagoon, although separated from Carmel Valley and McGonigle Canyon by the San Diego Freeway, is an extremely important part of this subsystem. Its value as a wildlife habitat for many marine and terrestrial animals and plants should not be underemphasized. Because the entire subsystem is being encroached upon by urban development, efforts to assure its preservation should be undertaken as soon as practicable.



Carmel Valley

As in the Tia Juana River Valley Subsystem, the San Diego Gas & Electric Company has a large (240 acre) ownership which it intends to utilize as the location of a nuclear power plant sometime in the 1980's. Again, such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem; however, a number of approvals and clearances must be obtained prior to the plant's construction becoming a reality.

Plaintiff's
EXHIBIT "11"

CITY of SAN DIEGO
MEMORANDUM

June 27, 1972

File

MDS

Transcript of Council Conference on Open Space, March 16, 1972

Moore - regional systems involve other governmental agencies, and therefore more complex participation issues are involved.

Sub-regional systems are more immediate, clearly requiring City initiative.

Goff - There are interchangeable aspects between regional and sub-regional systems;
they can interchange.

Moore - Our financing capability is better related to the sub-regional system. Other agencies will be involved in acquiring the regional system.

Morrow opposed to use of term, "acquisition," would prefer to exhaust possibilities offered by agricultural and floodplain zoning. Also opposed to priority list of open spaces, since such a list could cause the owners of the parcels concerned to raise their asking prices.

Planning and City Attorney are directed to prepare a schedule of those open space areas on which City could proceed to initiate agricultural, floodplain, and/or LC rezoning.

Plaintiff's
EXHIBIT "22"

COUNCIL CONFERENCE
3:15 p.m.
Thursday, March 16, 1972
Conference Room

ATTENDANCE Present: Councilmen Johnson, O'Connor, Landt, Morrow, Martinet, Bates, and Mayor Wilson.
Absent: Councilmen Williams and Hitch.
Also Present: City Manager Moore, Assistant to the City Manager Lockwood, Deputy City Attorney Valderhaug, and Recreation Director, Pauline des Granges.

. . . .

OPEN SPACE BOND ISSUE Mr. Moore announced that the purpose of the Conference was to get down to cases and recognize city-wide open spaces. He gave a brief resume of his report on the needs and financing of the Open Space System; recommending that not more than 2/3's of the Environmental Fund be ear-marked for open space acquisition, and further recommended the Auditor's six-year scheduling of bond sales.

Mr. Goff gave a presentation of inventory of areas designated as desirable for acquisition as open space.

Mr. MacFarlane presented an evaluation of lands listed in the inventory.

Mr. Sage spoke on available methods of financing with suggested alternates:

1. Special Environmental Growth Fund and General Obligation Bonds.

this method would provide a substantial portion of the funding requirements for the program at a

reasonable borrowing cost. It would have no effect on the property tax rate provided the Council did not eliminate the Special Environmental Growth Fund. A two-thirds affirmative vote of the electorate would be required to issue general obligation bonds.

2. Charter Change. A Charter change could be placed on the ballot whereby the Special Environmental Growth Fund would be established by Charter, calling for a fixed percentage of the San Diego Gas & Electric Company annual franchise fees to be placed in the fund for open space and authorizing the City Council to incur debt for open space purposes using the monies available in the established fund.

Only a majority vote of the electorate would be necessary to pass the Charter change. It would establish and restrict certain funds for a definite environmental program and would provide the Council with flexibility in amending the program.

Mr. Moore stated that the primary thing the Council should resolve at this Conference is the tentative approval of the tentative system; resolve which election it is going to go on, and what portion of the Environmental Fund they wish to pledge for this particular purpose; recommending they consider 2/3's of that fund for this purpose.

Mayor Wilson stated it was his opinion that the General Obligation Bond would give the City the best rate, and what the people needed, in order to pass it, was the assurance that it would not cost them anything; which is what the City can give them by the action of the Council.

Plaintiff's
EXHIBIT "22A"

Councilman Martinet moved that an Ordinance be placed on the docket adding a proposition to the Special Municipal Election Ordinance providing a Charter Amendment pledging 2/3's of the franchise fee for the purpose of debt service and retirement of the principal for bonds for the purpose of acquisition of open space for parks. This was seconded by Councilman Morrow and carried unanimously.

On motion of Councilman Martinet, seconded by Councilman Morrow, the Planning Director and the City Attorney were directed to proceed to determine a schedule of those open space areas which they felt they could proceed to rezone.

Deputy City Attorney Bulens stated he thought there should be a Resolution passed by the Council authorizing the Attorney's Office to work with the Bond Counsel.

Councilman Bates moved that the Planning Department be directed to report back after studying as to the propriety of the proceedings with further flood plain zoning on flood plains located within the City. Councilman Landt seconded this motion which carried unanimously.

ADJOURNMENT The meeting was adjourned at 5:34 p.m.

Ann Jollett
Recording Secretary

Plaintiff's
EXHIBIT "22A"

APPENDIX "A"

INVALIDATION -- A REMEDY?

In 1969, Richard Roe acquired Blackacre, a 20-acre parcel of unimproved land in the coastal area of a Southern California county. Investigation prior to purchase revealed that the land was located in the county, immediately adjacent to the growing city of Valverde. The land had no apparent limiting physical characteristics, and the county had been approving development for residential purposes on similarly situated land in the vicinity. Though located on the fringe of a drainage basin, the land was gently sloping and did not appear to be in any kind of flood plain proper.

Richard, a ranger with the State Department of Parks and Recreation, was married with two young children. The downpayment for the property was made from savings accumulated during the period of years that both he and his wife were employed early in their marriage.

Development for residential purposes within the county was available and processing of a planned subdivision in simple grid fashion was commenced. The property owner was approached by the City of Valverde with respect to annexation. The city indicated that it would bring sewer and water service and other municipal services to the property and that a well planned residential development of reasonable density would be favorably considered.

The property owner was persuaded by the city's proposal, since municipal services were not as readily available in the county's jurisdiction. A plan was developed for preplanning the property prior to annexation and the property was placed in a sewer assessment district with a proportionate cost of a major trunk sewer line assessed against the property.

1971 Processing of a planned residential development for the property commenced with the city.

1972 Processing delayed while the city implemented environmental impact report requirements pursuant to the *Friends of Mammoth* decision.

1973 Coastal Initiative went into effect.

1974 Planned residential development (hereinafter "PRD") delayed because of environmental impact report delay.

1975 PRD approved in concept.

Coastal permit applied for, but denied because of alleged discrepancy in the mapping of the flood plain designation by the county.

1977 New Coastal Act went into effect.

1978 Coastal permit denial invalidated, remand to Coastal Commission.

1979 Coastal permit again denied, this time because of potential prejudice of approval of the project to the preparation of the local coastal program.

1981 Denial of coastal permit invalidated and matter remanded to Coastal Commission.

PRD approval at the city expired. New application required, complying with all new rules and regulations.

1982 Updated assessment of environmental impact disclosed several fragments of Indian arrowheads on the property. The city required as a condition of approval of the PRD that a detailed archaeological survey of the property be made at an expense of approximately $50,000.

1985 City's condition on approval invalidated as patently unreasonable, matter remanded to city.

County and State Coastal Commission advocated the acquisition of the property by the public for "buffer reserve" in the drainage basin.

1986 Bond election held to raise funds to acquire the property for public use.

Bond election failed. Public interest in the property "expressly withdrawn".

1987 Approval of PRD denied because proposed use "inappropriate".

1990 Denial of PRD invalidated, matter remanded to city.

1991 Approval of PRD denied because residential density sought "too high for the area".

1993 Denial of PRD invalidated, matter remanded to city.

1994 Proposed project modified to reduce density by 20%.

Project approved, but subject to the condition that the property owner dedicate four acres of the property to the city for right of way and substation purposes for a proposed mass transit line which was included in the city's general plan.

1996 Condition requiring dedication invalidated as unreasonable, and the matter was remanded to the city.

Rezoning of property to one residence per 20 acres completed.

1999 Rezoning invalidated as unreasonable.

In the year 2000, his children, the assurance of whose education was one of the objectives of the original investment, had long since graduated from college with the benefit of government loans. Richard was thoroughly frustrated with the land use planning process in California. Despite the fact that he had paid real property taxes, sewer district assessments, insurance premiums for liability insurance, and enormous amounts for legal fees over the past 30 years, he decided to abandon any efforts to develop the property.

He offered to dedicate the property to the City of Valverde for no consideration. The city declined to accept the offer of dedication on the basis that to do so would take private property off the tax rolls, create a problem for the sewer assessment district, and create further liability exposure for the city.

After some effort, Richard located a non-profit conservancy entity which was willing to accept a gift of the property and deeded the property over to it. He took an income tax deduction for a charitable contribution in the amount of his initial investment. The Internal Revenue Service denied the deduction on the theory that based upon the planning history of the property for more than 20 years, the property apparently had no beneficial highest and best use and could have no more than a nominal fair market value.

Supreme Court, U. S.
FILED
NOV 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

MOTION TO DISMISS APPEAL OR AFFIRM

JOHN W. WITT, City Attorney
C. ALAN SUMPTION, Deputy City Attorney
City Administration Building
202 "C" Street
San Diego, California 92101
Telephone: (714) 236-6220

Counsel for Appellees

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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IN THE

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OCTOBER TERM, 1979

No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

MOTION TO DISMISS APPEAL OR AFFIRM

Appellees move that the appeal herein taken be dismissed on the grounds that the United States Supreme Court does not hve jurisdiction under 28 U.S.C. 1257(2); the federal question sought to be reviewed was not expressly passed on; the judgment rests on an adequate nonfederal basis; and the appeal does not present a substantial federal question; or alternatively that the judgment be affirmed.

STATEMENT OF THE CASE

Appellant's statement of the case is misleading and inaccurate in numerous instances; however, for the most part, said inaccuracies relate to the merit of the issues and are irrelevant to the question of jurisdiction.

Appellees, therefore, will not burden this Honorable Court by making a full recital of the facts as supported by the record below, but will instead make brief references to, and correct some of the misstatements which relate to a proper perspective of the case.

The property which is the subject of this action is a drainage basin, tidal basin or flood plain, portions of which constitute an estuary and wildlife refuge and are within the California State Coastal Act Zone and subject to that act as to any development or use of said property (see Appellant's Appendix, G-2).

The property is vacant and unused except for some utility lines and appellant has never made application to appellee City of San Diego to use or improve it, nor has it asked the City what development might be permitted (Appellant's Appendix, G-4).

The Open Space Plan adopted by appellee City of San Diego as it related to appellant's property made specific comment that the open space designation did not preclude use of the property for a power plant.

There were never any zoning hearings to rezone appellant's property for "open space." The hearings appellant refers to were to rezone the property from industrial and agricultural zoning to agricultural or other appropriate zoning. As a result of those hearings, appellee City rezoned portions of the property from

industrial zoning to agricultural and from agricultural to another agricultural or "holding" zone. (Appellant's Appendix, G-2 and G-3.)

Appellee City of San Diego has no such zone as an "open-space" zone and appellant's reference to California Government Code, Section 65910 requiring adoption of an open space zone is expressly inapplicable to a charter city such as San Diego by California Government Code, Section 65803. Other California Government Code sections set forth in Appellant's Appendix, K-4 through K-7, are expressly inapplicable to a charter city unless adopted by charter or ordinance of the city, except for the requirements that a general plan containing the mandatory elements be adopted. California Government Code, Section 65700. (See Appellant's Appendix, B-5.)

No formal declaration of intent to condemn the subject property was ever made by appellee City of San Diego. The report entitled, "Staff Report, Park Reserve Systems, April 29, 1973," was a financing study of acquisition of open space lands expressly stating its purpose of ". . . establishing a broad guideline for possible future acquisition. . ." and that "It is not the intent, by creating this report with its attached tables and map, to specifically designate any particular property for acquisition. . . ."

The resolution included in Appellant's Appendix, K-8 and K-9, did not identify any specific properties and was adopted by appellee City solely to comply with San Diego City Charter, Section 90 relating to bonded indebtedness for purposes of presenting a ballot proposition to the electorate.

Appellant sought by its complaint money damages for a "taking or damaging" of its property and for a declaration that certain acts by appellee City were invalid and unconstitutional as unreasonable exercises of the police power.

In appealing the trial court judgment, appellees, in addition to raising errors of law, contended that material findings of fact made by the trial court were not supported by any substantial evidence.

LACK OF JURISDICTION

Appellant attempts to invoke the jurisdiction of this Court under 28 U.S.C. Section 1257(2), which provides in part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

It is abundantly clear from the decision below (Appellant's Appendix G), appellant's statement of the case and its framing of the questions presented that a state statute was not upheld upon an attack of being repugnant to the United States Constitution.

1. Appellant Does Not Contend That Legislation Is Repugnant To The Constitution

Appellant never contended below that a legislative enactment or enactments had the effect of violating its constitutional rights--rather it contended and the trial court found that a "continuing course of conduct," including rezoning, adoption of an open space plan, preparation and acceptance of open space financing plans, open space bond ballot propositions, etc., constituted a "taking" of its property. (Appellant's Appendix, A-2 through A-9.)

Throughout its jurisdictional statement appellant refers to the "actions" and "conduct" of appellees "taken as a whole" as having an unconstitutional effect upon its property rather than a particular legislative enactment or enactments.

Appellant has gone to great lengths throughout the trial and the appeals, including the statement of the case in its jurisdictional statement here, to cast this case in the light of illicit motive on the part of appellees to acquire its property for open space at a reduced value or to prevent any use of it so it would remain open space without acquisition by appellee City.

The testimony of appellant's witnesses at trial on the effect of the land use decisions complained of is clearly predicated upon their belief that said actions were undertaken with such an improper motive rather than upon the objective effect of the only two "legislative" actions involved (enactment of a zoning ordinance and adoption of an open sapce plan).

The law is clear that the motives of legislators in enacting legislation is irrelevant to the issue of constitutionality of the

legislation. *United States v. O'Brien*, 391 U.S. 367, 383, 20 L.Ed.2d 672 (1968). This rule is adhered to in California with the exception of unreasonable precondemnation conduct. *Pinheiro v. County of Marin*, 60 Cal.App.3d 323, 327-328 (1976). Said exception is not dependent upon the adopted legislation being invalid or unconstitutional--the remedy for such actions being recovery of damages in the eminent domain action. *Klopping v. City of Whittier*, 8 Cal.3d 39, 52 (1972).

Appellant's portrayal of this case as involving improper motives is also disclosed in its framing of the issues. In essence appellant seeks to punish a city for what it perceives as illicit motive and conduct, such being analogous to a tort theory under the guise of a constitutional "mandate." Such a contention was rejected in the case of *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 518-519 (1975), cert. den. 425 U.S. 904, 47 L.Ed.2d 754 (1976).

2. The Open Space Plan Is Not A "Statute"

The term "statute" as used in 28 U.S.C. Section 1257(2) has been interpreted to mean "any enactment from whatever source originating, to which a State gives the force of law." *Lathrop v. Donohue*, 367 U.S. 820, 824, 6 L.Ed.2d 1191, 1195 (1961). The adoption of an open space plan by a city council resolution (Appellant's Appendix, K-10), while arguably an "enactment," does not have the force of law. *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 119-120 (1973); Appellant's Appendix, B-5.

3. The Decision Appealed From Did Not Hold Legislation Valid

The decision appealed from (Appellant's Appendix, G-1 through G-4) is the opinion of the Court of Appeal, Fourth Appellate District, Division One (the California Supreme Court denied hearing without opinion). Said opinion neither holds the zoning ordinance and general plan open space element valid nor invalid. Instead, it states that the assertions that appellee City arbitrarily exercised the police power by enacting an unconstitutional zoning law and general plan element or applying them unconstitutionally are disputed fact issues not covered by the trial court. (Appellant's Appendix, G-4).

In order for jurisdiction to lie under 28 U.S.C. 1257(2), the decision appealed from must have passed on the validity of the statute. *Wilson v. Cook,* 327 U.S. 474, 481, 90 L.Ed. 793 (1945). Something more than a claim of federal right is necessary; the attack must be upon the *validity* of the order, not merely upon the court's judgment. *Live Oak Water Users' Asso. v. Railroad Commission,* 269 U.S. 354, 357, 70 L.Ed. 305 (1925).

4. The Cases Cited By Appellant As Supporting Jurisdiction Are Inapposite Here

a. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 57 L.Ed.2d 631 (1978).

In this case the trial court enjoined the city from enforcing landmarks legislation as being unconstitutional as applied. The highest state appellate court reversed the judgment. The Supreme Court addressed itself only to the question of the effect of the legislation which had been upheld below and did not

review the question of appropriate remedy were the legislation determined to have effected a constitutional "taking" of property.

b. *Moore v. East Cleveland*, 431 U.S. 494, 52 L.Ed.2d 531 (1977).

This case involved a criminal prosecution under an ordinance attacked as violative of Fourteenth Amendment due process. The ordinance was held valid by the state appellate court. There was no contention of appropriate remedy for a "taking" of property.

c. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 8 L.Ed.2d 130 (1962).

Here the state appellate court upheld the validity of an ordinance in an action to enjoin its enforcement as being violative of the Fourteenth Amendment. No issue of compensation as a remedy was raised.

d. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303 (1926).

A U.S. District Court enjoined enforcement of a zoning ordinance as being unconstitutional and void. The issue before the Supreme Court was the validity of the ordinance.

e. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L.Ed. 322 (1922).

The State Supreme Court upheld a statute in an action to enjoin its enforcement. No issue of remedies was raised. The Supreme Court said the issue was how far the police power could go.

THE JUDGMENT BELOW RESTS UPON AN ADEQUATE NONFEDERAL BASIS

The issue of appellant's failure to exhaust its administrative remedies by applying for development permits on its property or relief from the land use restrictions as applied was raised by appellees at trial and throughout the appeal process.

It is clear in the Court of Appeal's opinion (Appellant's Appendix, G-4) that this fact was relied upon in reversing the judgment and denying appellant any relief. It is well settled law in California that the doctrine of exhaustion of administrative remedies applies to constitutional challenges of zoning ordinances. *Metcalf v. County of Los Angeles*, 24 Cal.2d 267 (1944); *Mountain View Chamber of Commerce v. City of Mountain View*, 77 Cal.App.3d 82, 93 (1978).

This Court should therefore dismiss this appeal as the decision is based upon state law rather than a federal question. *Copperweld Steel Co. v. Industrial Com.*, 324 U.S. 780, 785, 89 L.Ed. 1363 (1944).

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

1. The Decision Of The Court Of Appeal Here Is Not As Broad As Appellant Suggests

The decision below does not hold, as appellant contends, that a property owner may *never* recover money damages as a remedy for an unconstitutional exercise of the police power.

It merely states that such an exercise of the police power does not "require" compensation, citing the case of *Agins v. City of Tiburon,* 23 Cal.3d 605 (1979). This decision is obviously limited to the facts in this case. Among those facts are: Appellant's failure to apply for development of its property; that the property is not being used; that no actual or physical public use is being made of the property; that no formal actions were taken by the city to condemn the property; mere planning activities relating to *potential* acquisition were involved.

The Court of Appeal decision here, as well as the *Agins v. City of Tiburon, supra,* 24 Cal.3d 266, case did not disturb the line of cases involving unreasonable precondemnation conduct where money damages may be awarded. *Agins, supra,* at pp. 277-278.

2. The Fifth Amendment Does Not Compel Damages As A Remedy For Exercises Of The Police Power Which Exceed Constitutional Limits

The Supreme Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which,

in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 4 L.Ed.2d 1554 (1960).

The Fifth Amendment is a *prohibition* upon governmental excesses. Where legislation is involved, a declaration of invalidity or enjoining the application fulfills the constitutional purpose. It is not necessary to fulfill said purpose to transmute an *unlawful* exercise of the police power into the *lawful* taking of private property by the power of eminent domain thereby requiring a transfer of title and payment of fair market value as damages.

3. The Decision Below Is Not In Conflict With Federal Decisions

The *Lake Country Estates v. Tahoe Reg. Planning,* ____ U.S. ____, 59 L.Ed.2d 401 (1979) case involved a claim under the federal Civil Rights Act, 42 U.S.C. Section 1983, and the decision did not involve the issue of whether the constitution compelled money damages.

The case of *Richmond Elks Hall Assn. v. Richmond Redevelopment,* 561 F.2d 1327 (9th Cir. 1977) did not involve an exercise of the police power--it involved actions of a redevelopment agency possessing the power of eminent domain and relating to acquisition. The language in this opinion relating to the police power is obiter dictum. The decision also erroneously cites the case of *Berman v. Parker,* 348 U.S. 26, 99 L.Ed. 27 (1954) as a case holding that actions of the police power which effect a taking require payment of compensation. The *Berman* case involved a plaintiff seeking to *enjoin* the

condemnation of his property by contending the enabling legislation was for a private rather than public purpose. It was not a police power case.

The language appellant relies upon in *Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. 393, 67 L.Ed. 322, is likewise dicta in that the action involved an injunction, not inverse condemnation. Furthermore, the court's statement that there must be an exercise of eminent domain to *sustain* the act certainly implies a contrary result where the act is invalidated.

CONCLUSION

Appellant seeks this Court to grant jurisdiction in order to argue issues of federal rights where said rights were not the basis of the decision below, where no substantial federal question is involved, and where no statute has been adjudged valid below.

This appeal should be dismissed or the decision below affirmed.

Dated: November 27, 1979

Respectfully submitted,

JOHN W. WITT, City Attorney

By C. Alan Sumption
C. Alan Sumption, Deputy

Counsel for Appellees

Supreme Court, U. S.
FILED
DEC 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

REPLY BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY TO MOTION TO DISMISS APPEAL OR AFFIRM

LOUIS E. GOEBEL
LUCE, FORWARD, HAMILTON
& SCRIPPS
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California 92101
Telephone: (714) 236-1414
Counsel for Appellant

December, 1979

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-678

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On Appeal From The Supreme Court Of California

REPLY BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY TO MOTION TO DISMISS APPEAL OR AFFIRM

THIS COURT HAS JURISDICTION

Contrary to the view expressed by the City of San Diego (hereinafter referred to as the "City") in its Motion to Dismiss Appeal or Affirm (hereinafter referred to as the "Motion") this Court does have jurisdiction of the appeal by San Diego Gas & Electric Company (hereinafter referred to as the "property

owner") under 28 U.S.C. § 1257(2), as amply demonstrated in the Jurisdictional Statement and Appendix already filed with the Court (hereinafter referred to as "J.S." and "J.S.App.").

To demonstrate that the City's contention is totally without merit, property owner will reiterate and show that it has consistently and specifically challenged the validity of the "state statutes" throughout the long procedural history of this case and that the state court has sustained their validity against the allegation that such statutes are repugnant to the Federal Constitution.

1. The Property Owner Has Specifically Challenged The Validity Of "State Statutes."

The definition of the phrase "statute of any state" used in 28 U.S.C. § 1257(2) has been defined many times by this Court and has been interpreted as "broadly comprehending any legislative proceeding from the law-making agencies of the state. . . ." *King Manufacturing Co. v. City Council of Augusta,* 277 U.S. 100, 102 (1927). This Court there stated that the acts of a subordinate instrumentality of the state, exercising delegated legislative authority, such as a municipality adopting an ordinance, are "state statutes" for jurisdictional purposes.

> [t]he jurisdictional provision uses the words "a statute of any State" in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the State gives its sanction. 277 U.S. at 104.

It is the "legislative character" of the act which is the decisive factor in determining whether the order is a "statute" for 28 U.S.C. § 1257(2) purposes. In resolving this issue in specific cases this Court in the past has found a municipal ordinance "passed under authority delegated by the legislature" to be a "state statute." *Reinman v. Little Rock,* 237 U.S. 171, 176 (1915). It has delineated the characteristics of a "statute" as, a provision or enactment of a subordinate instrumentality of a state which "ordains, permits or prohibits," a rule "intended to be observed and applied in the future." *King Manufacturing Co. v. City Council of Augusta, supra,* 277 U.S. at 103, 104. Noting that the order was issued in accordance with and in implementation of legislative policy, this Court found a state court order to be a "statute" within the meaning of 28 U.S.C. § 1257(2). *Lathrop v. Donohoe,* 367 U.S. 820 (1961). Only recently this Court found to be a "statute" a City's comprehensive program to preserve historic landmarks by controlling development on such sites, which enactments were the implementation of state public policy to preserve areas with special historical or aesthetic interest. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 108 (1978).

Applying these precedents to the instant case, it is unmistakably clear that regulations and ordinances challenged by property owner are "statutes" within the meaning of 28 U.S.C. § 1257(2). The California Legislature has declared that the preservation of open-space land is a necessary and important policy of the state and that all regions of the state are to coordinate and implement plans for the conservation and preservation of open-space land. California Government Code § 65561, J.S.App. K-5. California Government Code § 65700

provides that charter cities shall adopt a general plan with certain mandatory elements, one of which must be an open space element, as provided by Government Code § 65300 and § 65560 et seq. (J.S. App. K-5, 6, 7). The open-space element adopted by the City mandates the preservation of open-space, and the City's zoning ordinances, which the trial court found to be consistent with the open-space element, (J.S.App. A-8, B-6) implement the expressed state legislative policy.

The property owner has consistently challenged through the entire course of this litigation, the validity of these "state statutes" as being repugnant to the United States Constitution.

2. The State Court Did Uphold The Validity Of The Statutes Against The Allegation That They Were Repugnant To The Federal Constitution.

To argue, as the City does, that the decision of the California Court of Appeal in this case did not "validate" the challenged statutes (Motion 7), misconceives the actual holding of the court below and ignores the interpretation this Court has given to that term in 28 U.S.C. § 1257(2) ("the decision is in favor of [the] validity of [the statute]").

For purposes of appeal, the "validity" of a statute is sustained when the state court finds, implicity or explicitly, that the challenged statute is consistent with the Constitution. The City either misunderstands or mistakes the holding of this Court in *Wilson v. Cook*, 327 U.S. 474 (1975) if it cites the case for any other proposition. The Court in *Wilson v. Cook* specifically held that what is necessary to satisfy this mandatory jurisdictional requirement is that:

> "the question of the validity under federal law of the state law, as construed and applied, has either been presented for decision [citations omitted] or has in fact been decided by it. . . ." 327 U.S. at 840.

As long as the challenge to the statute has been made, the state court's language need not be explicit, and in fact, the court can be completely silent, and as long as the statute is upheld, the court has necessarily rejected the objection. *See Largent v. Texas,* 318 U.S. 418 (1943); *Lawrence v. State Tax Commission,* 286 U.S. 276 (1932).

In the case before this Court, the lower court found after a full trial that the ordinances and regulations challenged were invalid "within the meaning of the . . . United States constitution []" (J.S.App. A-8, 9) and awarded compensation. The Court of Appeal in its original review affirmed this finding. J.S. App. B-8. The case was later returned to the Court of Appeal by the California Supreme Court to be "reconsidered" in light of its recent decision of *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979). J.S.App. E. In *Agins* the California Supreme Court had addressed substantially the same issues as were involved in the instant case, including the allegations that such ordinances and regulations were repugnant to the Fifth Amendment of the United States Constitution. The California Supreme Court sustained the validity of the City of Tiburon's open space ordinances against this claim, holding that the property owner was not entitled to compensation. J.S.App. F. When the Court of Appeal reconsidered this case in light of *Agins*, it held that the ordinances and regulations did not entitle the property owner to compensation. J.S.App. G.

The state court has sustained or upheld the validity of the "statutes" against the contention that they are invalid as repugnant to the United States Constitution" [1]

THE CITY'S ARGUMENT THAT PROPERTY OWNER HAS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES IS TOTALLY ERRONEOUS

The City's erroneous contention that the decision by the Court of Appeal is in fact premised on the theory that property owner has failed to exhaust its available administrative remedies, and thus that the decision is based on adequate nonfederal grounds, is belied by the very language of the court's opinion and ignores the extensive discussion the court gave to this issue.

The Court of Appeal in its original decision (J.S.App. B-7, 8) dealt squarely and emphatically with the issue of exhaustion raised by the City and stated:

> "As to [the inverse condemnation] counts, there was no failure to exhaust any administrative remedy since none existed [citations omitted]. If the ordinance is allegedly void, then it is necessary to exhaust its administrative remedies . . . unless it would be futile to do so. . . . It would [be] futile to seek administrative

---

[1] If this Court for any reason believes that review of this state court decision is not by appeal under 28 U.S.C. § 1257(2), property owner respectfully requests that its papers be considered as a petition for certiorari under 28 U.S.C. § 2103.

> review and was unnecessary for [property owner] to exhaust its adminstrative remedies in this regard." J.S.App. B-7, 8.

On reconsideration the court reaffirmed this when it stated:

> "Even assuming no use is acceptable to the City. . . . [property owner's] remedy is . . . not inverse condemnation." J.S.App. G-4.

THE CITY HAS FAILED TO DEMONSTRATE THAT THE NOVEL DECISION BELOW IS SUPPORTED BY FEDERAL PRECEDENT

1. The State Court Decision Is In Direct Conflict With Constitutional Principles And Federal Law.

The City, unable to demonstrate that the decision by the state court in this case, applying the *Agins* rationale, is supported by constitutional principles or federal precedent, unpersuasively attempts to avoid this fact by suggesting that the decision in this case is not as broad, and indeed as shocking, as property owner has demonstrated in its Jurisdictional Statement. Unfortunately for property owner, and all property owners in California and elsewhere if the decision is allowed to stand, the decision did hold that a property owner may never bring an inverse condemnation action seeking compensation in damages for an unlawful and excessive exercise of the police power in the land-use planning area.

One would almost think from reading the decision of the California Supreme Court in *Agins,* the Court of Appeal decision in the instant case, and the City's Motion, that the term "compensation" did not appear in the Fifth Amendment and

was instead an "optional" remedy which a state court could decide was or was not necessary.

The Fifth Amendment provides the "private property [shall not] be taken for public use, without just compensation." Despite this clear and explicit constitutional mandate, the California Supreme Court in *Agins* balanced the burdens of this remedy (compensation) against the benefits it perceived in another remedy (invalidation) and concluded compensation was "an inappropriate and undesirable remedy." J.S.App. F-9.

The rationale and justification of the *Agins* decision for rejecting compensation as a remedy was that the increasing value of land and the resulting fiscal burden to the state or city that would occur if compensation were required meant that "the scope of the application [of constitutional guaranties] must . . . contract" in order to meet the flexibility needs of community planners. J.S.App. F-10.

Thus although the trial court in the instant case found that the regulations were arbitrary, excessive and unconstitutional, that the City had commenced and then abandoned direct acquisition efforts; that the City's actions were motivated to achieve a public purpose, and that these regulations and actions deprived the property owner of all practical, beneficial or economic use of the land (J.S.App. A-7, 8), the Court of Appeal found that these actions -- although they "deprive[d] the owner of the beneficial use of his land"--do "not require compensation. . . ." J.S.App. G-4.

Not surprisingly, the City fails to cite a single case which would support this "optional" characteristic for the compensation remedy guaranteed to private property owners by the Fifth Amendment of the United States Constitution.

2. The Questions Presented In This Appeal Are Of Substantial Importance.

The state court in this case, premised on the *Agins* decision, has rewritten and abrogated the important property right guaranteed under the Fifth Amendment of the United States Constitution. The California courts have ignored the constitutional framework of the issue of excessive land-use regulation, abdicated their judicial duty and responsibility, and have decided that the "needs" of community planners can determine what is a constitutionally permissible land-use decision. J.S.App. F-11. The *Agins* court, unknowing or uncaring of the constitutional consequences, concluded that it would be a "usurpation of *legislative* power" for the court to decide compensation was to be paid if a community planner has determined the action is "necessary." J.S.App. F-11.

This Court's intervention is urgently required to reaffirm the principle eloquently expressed by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922):

> "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by shorter cut than the constitutional way of paying for the change."

CONCLUSION

For the foregoing reasons, and the reasons stated in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

LOUIS E. GOEBEL

LUCE, FORWARD, HAMILTON & SCRIPPS

Counsel for Appellant

December, 1979

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-678

IN THE
Supreme Court of the United States

October Term, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The California Court Of Appeal,
Fourth Appellate District, Division One

BRIEF OF APPELLANT

Ruth R. Mijuskovic
Luce, Forward, Hamilton & Scripps
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California 92101
Telephone: (714) 236-1414

Of Counsel

Louis E. Goebel
Goebel and Monaghan
Security Pacific Plaza
1200 Third Avenue, Suite 1700
San Diego, California 92101
Telephone: (714) 231-0059

Gordon Pearce
General Counsel
Guenter S. Cohn
Assistant General Counsel
San Diego Gas & Electric Company
101 Ash Street
San Diego, California 92101
Telephone: (714) 235-7822

Counsel for Appellant

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,

Appellant,

v.

CITY OF SAN DIEGO,*

Appellees.

QUESTIONS PRESENTED

1. Do the Fifth and Fourteenth Amendments prohibit the state of California from denying the constitutionally mandated remedy of just compensation to a property owner for oppressive regulatory actions conceded to constitute a "taking" in the constitutional sense?

2. Does it violate the Fifth and Fourteenth Amendments for the state courts of California to provide that invalidation is the only remedy available to a property owner which has been denied all use of its property and the regulatory conduct complained of is not a single act, but a continuing course of conduct?

---

* The complaint named as defendants, in addition to the City of San Diego, the Mayor of the City of San Diego, Pete Wilson, the members of the City Council of San Diego, F. Gilbert Johnson, Maureen O'Connor, Lee Hubbard, Leon L. Williams, Floyd L. Morrow, Jim Bates, Robert Martinet, James Ellis and the Planning Director of the City of San Diego, James L. Goff.

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No. 79-678

IN THE

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SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

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CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The California Court Of Appeal,
Fourth Appellate District, Division One

BRIEF OF APPELLANT

THE OPINIONS BELOW

San Diego County Superior Court, following a full trial, entered judgment on October 8, 1976, (Jt. App. 44)[1] awarding money damages to San Diego Gas & Electric Company

[1] References to the Appendix to the Jurisdictional Statement will be hereinafter cited as "J.S. App." References to the Joint Appendix will be hereinafter cited as "Jt. App."

("Property Owner") for the taking of its property by the City of San Diego ("City").[2]

On June 13, 1978, the California Court of Appeal, Fourth Appellate District, Division One, affirmed the judgment of the trial court, finding that a "taking" had occurred and that Property Owner was entitled to monetary damages. The opinion was originally reported at 81 Cal.App.3d 844, 146 Cal.Rptr. 103.[3] (Jt. App. 48.)

The City appealed and the California Supreme Court granted a hearing on July 13, 1978 (J.S. App. D). After maintaining the matter on its docket without scheduling oral argument for almost one year, on June 14, 1979 the California Supreme Court transferred the case back to the Court of Appeal (J.S. App. E), to be reconsidered in light of its recent decision in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979). (J.S. App. F.)

The California Court of Appeal, without permitting additional briefing or oral argument by the parties, issued an unpublished opinion on June 26, 1979. The court, in contradiction to its previous opinion on the identical record, reversed the judgment of the trial court, finding that even if Property Owner had been denied all use of its land, it was not entitled to compensation because under the mandate of the *Agins* case, a

---

[2] The trial below was bifurcated at the defendants' request. The issue of liability was tried to the court, following which the court entered Findings of Fact and Conclusions of Law (Jt. App. 42) finding that a "taking" had occurred. The issue of damages was tried to a jury.

[3] When the California Supreme Court granted a hearing, the opinion of the court of appeal was "superseded" pursuant to the California Rule of Court 976 and is no longer deemed published.

party's sole remedy is to seek invalidation of the challenged regulations (Jt. App. 63).

Property Owner's petition for rehearing to the California Court of Appeal was denied (J.S. App. H), as was its petition for hearing to the California Supreme Court (J.S. App. I).

JURISDICTION

The California Court of Appeal, Fourth Appellate District, Division One, denied Property Owner's petition for rehearing on July 9, 1979. The California Supreme Court denied Property Owner's timely petition for hearing on August 22, 1979. Notice of Appeal to this Court was timely filed on October 3, 1979. The Jurisdictional Statement was filed on October 26, 1979.

This Court on June 16, 1980, postponed consideration of the question of jurisdiction until the hearing of the case on the merits. On July 11, 1980 the Clerk of the Court extended Appellant's time to file its brief on the merits to August 22, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2), or alternatively, under 28 U.S.C. § 2103.

Property Owner has challenged the regulatory actions of the City of San Diego on the ground that the effect of those actions has been to deny Property Owner all use of its land, thereby "taking" its property which requires payment of monetary compensation under the Fifth and Fourteenth Amendments to the United States Constitution. The decision of the state court which is challenged herein was that regulatory (police power) actions, even those which have the effect of denying a

landowner all use of its property can *never* amount a "taking" and thus a property owner is *never* entitled to bring an inverse condemnation action to require the payment of monetary compensation for such actions.

Cases sustaining jurisdiction of an appeal to this Court from a state court judgment on the issue of whether the regulatory actions of a governmental entity have amounted to a "taking" of private property and whether the property owner is thus entitled to monetary compensation for these activities are the following: *Agins v. City of Tiburon,* ____ U.S. ____, 100 S.Ct. 2138 (1980); *Kaiser Aetna v. United States,* 444 U.S. 164 (1979); *Penn Central Transportation Co.,* 438 U.S. 104 (1978).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

> "nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

The resolution of public convenience and necessity authorizing the acquisition of open space land for park use, including the subject property, is set forth in Resolution No. 207761 (J.S. App. K-8).

The adoption of the open space element of the City of San Diego's General Plan classifying the subject property as open space is set forth in Resolution No. 208180 (J.S. App. K-10).

The rezoning of a portion of the subject property is set forth in City Ordinance No. 11088 (J.S. App. K-12).

STATEMENT OF THE CASE

In 1966, Property Owner, the San Diego Gas & Electric Company, assembled a 412-acre parcel of property in an area in the northern part of the City of San Diego known as the Sorrento Valley. The land that is the subject of this suit is approximately 206 acres of this parcel and includes 25 acres purchased from the City. Property Owner paid almost $2 million dollars to acquire the subject land.

The land was then (and is now) unoccupied except for utility lines. The land is in a relatively flat area at low elevation. A portion of it is subject to tidal action from the Pacific Ocean and other portions subject to "ponding" or standing water, due to poor drainage. The entire parcel has only sparse vegetation due to the soil's high salt content.

Property Owner purchased the property as a future site for a power plant facility. Property Owner at the time of the acquisition undertook careful and detailed investigation to assure that its intended industrial use of the property would be feasible. It consulted with the City as to its plan to hold the land for proposed future construction of a power plant, as well as negotiating directly with the City when it purchased, at fair market value, 25 acres of the subject land from the City.

At the time of acquisition the bulk (approximately 120 acres) of the subject land was zoned M-I-A (industrial) and the rest primarily A-1-1 (agricultural or holding zone).

The General Plan of the City of San Diego adopted in 1967 designated most of the subject property for industrial use and the remainder as an area for "future growth." "The City of San Diego General Plan - 1990," adopted by the City Council on January 27, 1972, designated the area where the subject property is located as an area intended for industrial use.

A January 1972 report prepared by the City, "San Diego Industry 1969-1990, A Planning Analysis," identified the Sorrento Valley as one of the most desirable areas of the city for industrial expansion.

The Sorrento Valley area from 1966 on was the location of considerable industrial development and is at present, except for the subject property, substantially filled out with industrial development.

Early in 1972, as the City undertook the formulation of its open space plan to meet state statutory requirements,[4] changes affecting the subject land began to occur.

The identification of the land to be included within the "open space" element of the City's General Plan, to meet the state requirement, and the development of a schedule identifying land that could be rezoned to preserve its open space character was

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[4] The California legislature through Government Code § 65700 required all cities to adopt a general plan which contained an open space element, as provided by Government Code § 65300 and § 65560 *et seq.* J.S. App. K-5, 6, 7. See also Jt. App. 157.

assigned by the City Council to its Planning Department. The task of identifying "open space" land for park reserve areas, land which was to be acquired through direct acquisition and the development of funds to secure such land was a task delegated by the City to its Community Development Department.

At a March 16, 1972 meeting, the City Council directed the Planning Director to proceed with a schedule of the potential open space areas that could be rezoned (Jt. App. 164). On August 10, 1972 rezoning (from industrial to agricultural) was initiated on a portion of the subject land. On April 11, 1973, the Planning Commission held a public hearing on the rezoning of the subject property. At that meeting it recommended that approximately 39 acres be "down-zoned" from its existing industrial zoning classification (M-1-A) to an agricultural zone classification. A substantial portion (approximately 77 acres) remained zoned as industrial and another segment (approximately 50 acres) remained zoned as future industrial use, contingent upon submission of a specific plan. This recommendation was subsequently presented to the City Council on June 7, 1973 and adopted (Ordinance No. 11088, J.S. App. K-12).

In the other arena, during 1972 and 1973, the Community Development Department continued with its task of selecting and determining the cost of, and the financing of, the acquisition of "open space" land, primarily directing its efforts toward an "open space" bond issue on the September 1973 ballot. With this goal in mind, the Community Development Department in 1973 prepared a staff report entitled "Park Reserve Systems, April 29, 1973" in which substantially all of

the subject property (over 200 acres) was identified as an area designated for acquisition as "open space" land. The report estimated the acquisition cost of 120 acres of the subject land at that time would be approximately $900,000.

On April 17, 1973, the City Council adopted a resolution of public convenience and necessity (Resolution No. 207761, App. K-8) and proposed a $22.5 million bond issue for the acquisition of open space for park reserve areas, to be approved at the September 1973 municipal election. Maps prepared for the election identified the subject property as land to be acquired.

In May of 1973 the Planning Department was scheduled to hold a public hearing on the open space element to the City General Plan which it had prepared at the request of the City Council. The plan presented was entitled "A Plan for the Preservation of National Parks for San Diego."

Consistent with the Planning Department's earlier April 1973 rezoning recommendation down-zoning 39 acres of the subject property to agricultural (which recommendation would be presented to and adopted by the City in June), the plan designated a portion of the subject property (approximately 39 acres) as "open space." The maps prepared for the public presentation identified 39 acres of the subject land as "open space."

Because of a notice problem, it was necessary to continue the scheduled May 16 meeting. However, in preparing for the meeting, the Planning Department and the Community Development Department realized that the plans prepared by the two departments did not conform as to the areas designated

as "open space." (The Community Development Department had designated over 200 acres of the subject land as open space and identified it as land to be purchased through the bond issue. The Planning Department only designated 39 acres of the subject land as open space and had recommended down-zoning to agricultural).

Since the Planning Department had in the past been instructed to conform its efforts to those of the Community Development Department, the revisions to coordinate the respective plans resulted in the inclusion of over 200 acres of property owner's land, instead of 39 acres, under the "open space" designation of the City's General Plan.

When the continued hearing was held on May 23, 1973, the maps contained in the report, which were submitted to the public, still erroneously reflected the earlier plan, *i.e.,* 39 acres were designated as open space. No announcement of the alteration was made. Property Owner was unaware that a change had been made or of the impact of that change on its property. The revised open space plan designating over 200 acres, instead of the 39 acres, of Property Owner's land as "open space" was adopted by the Planning Commission.

The new open space element of the City of San Diego's General Plan was presented to the City Council on June 19, 1973. The maps that were distributed to each member of the Council and the members of the public similarly contained the erroneous designation of the area to be included in the open space area, although the large scale wall maps had been corrected. No mention of the discrepancy was made on the public record. The open space plan was adopted as presented. The result was that over 200 acres of Property Owner's land was

designated as open space, even though only a few days earlier (on June 7) the City Council had reviewed and accepted the rezoning recommendation of the Planning Commission which had down-zoned 39 acres of the same land to agricultural but had retained most of the subject land within the industrial use zoning designation.

The open space bond issue presented at the September 1973 election, which identified the 200 plus acres as land to be acquired for open space and park reserve, failed.

Following the failure of the 1973 bond issue, the City deleted the subject property from its list of properties proposed for open space acquisitions.

Property Owner thus held over 200 acres of land which it had purchased, some from the City itself, for industrial use. It had discussed its intended use with the City. Its intended use was permitted at the time of acquisition and was consistent with the designated long range intended future use for the area, according to the General Plan of the City as well as other planning guides. Now, however, the parcel was classified as an "open space" area.[5] The City had down-zoned a portion of the

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[5] The definition of open space under the San Diego General Plan is:

> "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

The Municipal Code of the City (§ 61.0601) defines open space as:

(Footnote continued on page 11)

subject land to agricultural, preventing industrial use. While some of the parcel remained zoned for industrial use, due to its designation as "open space" land, no industrial use was possible. Furthermore, because of the unique characteristics and location of the land no use other than industrial was possible.

Property Owner, on August 15, 1974, filed suit against the City, the City Council, and the Planning Director alleging that the effect of the regulatory actions of the City on its property amounted to a "taking" of its land entitling Property Owner to compensation (Complaint, Jt. App. 4). The defendants were successful in their demurrer to Property Owner's cause of action requesting mandamus relief to set aside the zoning actions. Property Owner amended the complaint to seek declaratory relief (Jt. App. 32).

At the liability phase of the trial, tried to the court, Property Owner presented evidence which established that the actions of the City had resulted in a "taking" of its land: Property Owner

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(Footnote 5 continued)

> "any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which, in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the "Progress Guide and General Plan for The City of San Diego" as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

established that the subject property was the product of a unique, carefully planned assemblage of real estate,[6] tacitly approved by the City.[7] The use (industrial) planned by the Property Owner was permitted and feasible at the time of acquisition[8] and was to be the intended use for the area for the foreseeable future.[9]

Property Owner established that at the culmination of City's actions all use of the land was now precluded: Expert testimony established that industrial use was the best, and indeed only feasible use, for the property[10] and that after the City's actions, including the classification of the land as open space, no industrial use was possible.[11] Furthermore, because of the unique physical characteristics of the property, no other

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6 Mr. DeVore of San Diego Gas & Electric Company testified that the parcel was carefully selected and acquired as a site for a future power plant facility. Jt. App. 69 [R.T. 3, 4, 7-12].

7 Jt. App. 70 [R.T. 9].

8 The City's General Plan in 1967 identified the area as intended for industrial use and future growth (J.S. App. A-3) and the bulk of the land was zoned for industrial use (J.S. App. A-3). See also Jt. App. 70 [R.T. 7-8].

9 The future planning instruments of the City - its General Plan and a study regarding future industrial areas - identified this area as intended for industrial use, at present and in future.

10 Mr. William Rick, an expert in land use planning and a civil engineer, testified that his feasibility study determined that industrial development was the only economically feasible use of the land. Jt. App. 110 [R.T. 123-137].

11 Testimony of Mr. DeVore, Jt. App. 80 [R.T. 47-48]; testimony of Mr. Worley, Jt. App. 85 [R.T. 95-96]; and testimony of Mr. Rick, Jt. App. 111 [R.T. 143-144].

practical or economic uses existed. No practical or economic agricultural use was possible, not even low density grazing.[12] No commercial use was possible.[13] No residential use was possible.[14] In its "after condition" the subject property had no practical, beneficial, or economic use,[15] and was unmarketable.[16]

Property Owner also demonstrated that the City of San Diego had a policy of requiring consistency between the actual use and development of land, and the open space designation of the General Plan (Jt. App. 159). Property Owner demonstrated that an industrial use was not consistent with the City's definition of open space.[17] The Planning Director of the City testified that in his opinion any industrial use would require a subdivision of the property and that thereby the requirement for consistency would be raised. He further

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12 Mr. A. Lee Griner, an expert agronomist, testified that the property could not be used for any agricultural purpose and would not support even low density grazing. Jt. App. 99 [R.T. 108-115] See also Jt. App. 96 [R.T. 126-127].

13 Testimony of Mr. Rick, Jt. App. 103 [R.T. 126-129].

14 Testimony of Mr. Rick, Jt. App. 104 [R.T. 126-129].

15 Testimony of Mr. DeVore, Jt. App. 81 [R.T. 58-59]; testimony of Mr. Rick, Jt. App. 111 [R.T. 129-130, 143-144].

16 Mr. Joseph Gallagher, an expert real estate appraiser, testified that subsequent to the open space designation there was no private use possible and the property was unmarketable. Jt. App. 125 [R.T. 272-273].

Mr. Frank DeVore confirmed this and testified that in his opinion after June 19, 1973, the property was, for all practical effect, devoted to public use as open space. Jt. App. 82 [R.T. 59].

17 See City's definitions of open space in n. 5, *supra*. *See also* Jt. App. 157 [R.T. 95-96, 201-202, 360-370].

testified that he did not know of an industrial use that would be consistent with open space.[18]

The trial court, based on this evidence, made the following Findings of Fact:

> "The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space . . . [deprived plaintiff] of all practical, beneficial or economic use of the property. . . ." (Finding of Fact 29)
>
> "No development could proceed on the property designated as open space unless it was consistent with open space. In light of the particular characteristics of the said property, there exists no practical, beneficial or economic use of the said property designated as open space which is consistent with open space." (Finding of Fact 30)
>
> "Following the actions of the defendant City in June of 1973, it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space or the remainder of the subject property." (Finding of Fact 32)
>
> "[T]he property . . . is unmarketable. . . ." (Finding of Fact 33)
>
> (Jt. App. 41)

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18 Testimony of Mr. Goff, Jt. App. 143 [R.T. 361-373].

The trial court, based on these findings, concluded as a matter of law that:

> "The actions of [the] City . . . deprive[d] plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, constitute a taking of plaintiff's property . . . without due process of law and just compensation within the meaning of the California and United States constitutions. . . . Plaintiff is entitled to judgment against defendant City of San Diego for money damages in an amount to be determined by the fair market value of the property. . . ."
>
> (Jt. App. 42)

The City appealed. The California Court of Appeal affirmed the judgment, specifically rejecting the City's arguments that the regulatory actions cannot give rise to an inverse condemnation cause of action, that money damages could not be awarded, or that administrative remedies had not been exhausted (Jt. App. 48), among numerous other issues.

The City petitioned the California Supreme Court to review the case and although review was granted the case was never heard by the California Supreme Court. The California Supreme Court on March 14, 1979 in the case of *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979) announced:

> "a local entity's exercise of its police power, which may exceed constitutional limits is [not] the equivalent to a lawful taking of property . . . thereby necessitating payment of compensation. . . . We . . . believ[e] the preferable view to

> be that . . . such governmental action . . . is invalid . . . [and] remedy by way of damages . . . is not thereby made available."
>
> (J.S. App. F-6)

Following the *Agins* decision, the California Supreme Court transferred the instant case back to the Court of Appeal to be "reconsidered" in light of *Agins* (J.S. App. E-1).

Without permitting additional briefing or oral argument, the Court of Appeal now reversed the decision of the trial court (and its own earlier affirmance), finding under the teachings of *Agins*:

> "[T]he individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation. . . . [nor] to a cause of action in inverse condemnation."
>
> "A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus."
>
> (Jt. App. 66)

SUMMARY OF ARGUMENT

The precedents of this Court clearly establish that a course of regulatory conduct can result in a "taking" of private property and that a governmental body cannot escape or avoid the constitutional imperative of just compensation merely because its actions were taken in pursuit of the public welfare.

Whether a "taking" has occurred in a particular case is determined from the effect of the actions on the property, particularly the economic impact of the regulations, the frustration of the owners' investment-backed expectations, as well as a balancing of the public need versus the private property owner's burden.

The trial court found in this case, following a full evidentiary hearing, that the effect of the regulatory actions was to deny the owner all practical, economic or beneficial use of its land, frustrate its investment-backed expectations, and that the regulations had gone too far and were too great a burden to ask one individual property owner to bear.

Although the Court of Appeal did not dispute this finding, it concluded based on the rationale expressed by the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979) that regulatory actions can *never* give rise to an inverse condemnation cause of action or a suit for damages.

This conclusion, that regulatory actions can never result in a "taking" and thus can never give rise to a suit for damages, but only invalidation, is contrary to settled law favoring the award of damages as "just compensation" for the taking of private property. Invalidation provides no just compensation to property owner in this case and as a matter of public policy is not a desirable remedy.

ARGUMENT

I

A COURSE OF REGULATORY CONDUCT WHICH PRECLUDES ALL PRACTICAL, BENEFICIAL OR ECONOMIC USE OF PRIVATE PROPERTY IS A TAKING.

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation."

The "taking" allegation, in the instant case, arises in the context of what is commonly referred to as "inverse condemnation," which as this Court only recently noted is merely a "shorthand description" of the method under which a landowner is entitled to bring an action against the government, because the constitutional compensation provision is of a "self-executing character," and to recover "just compensation", *i.e.*, "'to recover the value of property which has been taken . . . even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" *United States v. Clarke*, ____ U.S. ____, 100 S.Ct. 1127, 1129 (1980) (citation omitted).

The determination of which actions of a governmental entity amount to a "taking" of property thus entitling the property owner to bring his suit to recover "just compensation" has proven to be a problem of "considerable difficulty" (*Penn Central Transportation Co. v. New York*, 438 U.S. 104, 123 (1978)), and one for which this Court has indicated it has been unable to develop any "set formula" (*id.*), thereby necessitating an examination of the particular circumstances in each individual case (*Id.* at 124). See also *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

However, the guidelines established by this Court in previous cases dealing with the question of "takings" when applied to this case demonstrate unquestionably that a taking has occurred.

This Court long ago rejected the simplistic notion that a "taking" of property only occurs when there has been an actual physical seizure or invasion of private property and has instead held that the appropriate inquiry to be made when seeking to determine whether a taking has occurred is whether property rights have been destroyed by the governmental acts; *i.e.*, has there been a deprivation of one of the "essential sticks in the bundle of [property] rights . . ." *Kaiser Aetna, supra,* 444 U.S. at 176.

The desire to preserve open space on the theory that it is a physical, social, aesthetic, economic and ecological asset is not an impermissible goal or objective of governmental action in the pursuit of the public welfare and the common good, (*Berman v. Parker,* 348 U.S. 26 (1954)), and appellant does not so claim. One of the premises challenged in the instant case is the theory that the governmental agency can escape or avoid the constitutional imperative of just compensation merely because its actions were taken in pursuit of the public welfare. On many previous occasions this Court has recognized that merely because actions are taken pursuant to the "police power," they are not thereby immunized from the explicit restrictions of the Fifth Amendment:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . ."
>
> *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922).

Previous attempts to isolate and sever the exercise of the police power from the constitutional consequences of "taking," have been flatly rejected. *See Penn Central, supra,* 438 U.S. at 122 n. 25.

> "[W]e have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking."
>
> *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958).

In determining whether a taking has occurred, this Court has looked not to the name given to the actions by the governmental entity but to the *effect* of those actions.

> "The incantation pronounced at the time [of the government's action] is not of controlling importance; our primary concern is with the accomplishment."
>
> *Davis v. Newton Coal Co.,* 267 U.S. 292, 301 (1925).

Again, in *Hughes v. Washington*, 389 U.S. 290, 298 (1967) this Court stressed,

> "The Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does."

This Court only recently reaffirmed the validity of this rule when it observed that regulatory actions such as zoning can result in a "taking" of the property:

> "The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land. . . ."
>
> *Agins v. City of Tiburon*, ____ U.S. ____, 100 S.Ct. 2138, 2141 (1980).

Having clearly established that regulatory actions can result in a "taking," the next task is to determine if a taking has, in fact, occurred under the facts of this case.

This Court has identified certain criteria which have "particular significance" in determining when, "justice and fairness" require that the "injuries caused by public action be compensated by the government." *Kaiser Aetna, supra,* 444 U.S. at 175 (1979); *Penn Central, supra,* 438 U.S. at 124. See also *Pruneyard Shopping Center v. Robins,* ____ U.S. ____, 100 S.Ct. 2035 (1980):

1. *Is a valuable private property right entitled to constitutional protection being asserted*? The Court has indicated that while the concept of "property" in the Fifth Amendment is designed to protect the full range of interests that citizens possess, (*United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)) some regulation and infringement on some rights must be tolerated by each citizen for "some values are enjoyed under an implied limitation." *Pennsylvania Coal Co., supra,* 260 U.S. at 413. Moreover not all economic interests are property rights, but only those which have the law back of them, so that courts can compel compensation for their invasion. *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945). *See*

Kaiser Aetna, supra, 444 U.S. at 178, 180; *Penn Central, supra,* 438 U.S. at 125, 130.

2. *What has been the economic impact of the regulations on the owner*? The real world economic effect of the regulations, *i.e.*, "the economic impact of the regulation on the claimant," (*Penn Central, supra,* 438 U.S. at 124; *Kaiser Aetna, supra,* 444 U.S. at 175) is particularly relevant and must be considered. The Court has held that a taking has occurred if the owner, as a result of the regulations, has been denied the "economically viable use of his land" (*Agins, supra,* 100 S.Ct. at 2141).

Such an examination looks to the challenged regulations and their demonstrable effect on both the property and owner, both in terms of "severity" and "magnitude." *Penn Central, supra,* 438 U.S. at 131. See also *Virginia Surface Mining and Reclamation Assoc. v. Andrus,* 483 F.Supp. 425, 440 (W.D.Va. 1980), appeal docketed, No. 79-1538 (April 1, 1980).

3. *Has there been an interference with or frustration of the owner's investment-backed expectations*? Having examined the property right asserted, the degree to which the regulations have economically impacted that property right, the Court has also indicated that a key factor in determining whether a "taking" has occurred is to look at this particular property owner's subjective expectations - What were the owner's legitimate, reasonable, and investment-backed expectations as to this property right in question and have they been frustrated? Such an inquiry focuses on the permissible uses prior to and after the challenged regulations, the property owner's demonstrable expectations as to the use of the property and the financial

expenditures undertaken in expectation of fulfillment of that expected use. See, generally, *Kaiser Aetna, supra,* 444 U.S. at 175-176; *Penn Central, supra,* 438 U.S. 104.

4. *Is the burden placed on the property owner too great despite the public benefit?* This overlapping inquiry, involves a weighing and balancing of the competing interests between the needs of society and the legitimate expectations of the property owner. *Agins, supra,* ____ U.S. ____, 100 S.Ct. at 2142.

This Court has held that regulations that go "too far" in the burden they ask the property owner to bear, that place "an unduly harsh impact upon the owner's use" or cause a frustration of "distinct investment-backed expectation" can amount to a "taking," particularly when the challenged governmental actions are designed to "facilitate uniquely public functions." *Penn Central, supra,* 438 U.S. at 127-28.

II

PROPERTY OWNER PROVED AT TRIAL THAT THE EFFECT OF THE REGULATORY ACTIONS OF CITY WAS A "TAKING" OF ITS PRIVATE PROPERTY

Utilization and application of these "particularly significant" criteria to this case demonstrate that the regulatory actions of City did effect a "taking" of private property.

A. Property Owner's Valuable Property Rights, Entitled To Constitutional Protection, Have Been Violated.

The "bundle" of rights of which property consists is entitled to constitutional protection, as this Court has long recognized. When regulations have deprived the owner of one of the "essential sticks in the bundle of [property] rights," and have extinguished a fundamental attribute of ownership, a taking has occurred. *Kaiser Aetna, supra,* 444 U.S. at 176.

> "The right of a person to own land and the protection of that right were sacred tenets of the common law; and it is no less sacred today as the population booms. We are aware [that there is only] so much land; that each parcel is considered unique; therefore, as the desire for land increases and the parcels of ownership become smaller and smaller the importance of the Fifth Amendment increases rather than diminishes.
>
> *Virginia Surface Mining and Reclamation Assoc. v. Andrus,* 483 F.Supp. 425 (W.D.Va. 1980).

Property rights "denote the group of rights inhering in the citizens' relation to the physical thing, such as the right to possess, *use and dispose of it.*" *United States v. General Motors Corp.,* 323 U.S. 373, 377 (1945) (emphasis added).

The right to a reasonable economic use, the right to develop, is one of *the* fundamental aspects of the right of private property ownership.

When the result of the governmental actions is to "take away the use and value" of the property, the result is effectively the

appropriation of the title to the property. *United States v. Lynah,* 188 U.S. 445, 470 (1903).

> "Property is taken in the constitutional sense when inroads are made into the owner's use of it. . . ."
>
> *United States v. Dickinson,* 331 U.S. 745, 748 (1947).

As the facts of this case so vividly demonstrate, Property Owner in this case cannot use its property either for its intended purpose or for any other economic use. Property Owner holds 200 plus acres of land, purchased for almost $2 million, which is now unmarketable. It holds land which now has no practical or economic use. The only use for the land is the public use of open space park reserve.

As Justice Clark noted, dissenting in *Agins v. City of Tiburon, supra,* 24 Cal.3d at 282,

> "Today's decision effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation."

In *Kaiser Aetna, supra,* 444 U.S. at 176, this Court found that the invasion, frustration, or destruction of one of the essential sticks in the bundle of rights (there "the right to exclude") that are commonly characterized as property is a "taking."

Here there has been the total destruction of the fundamental attributes of private property ownership -- the right to a reasonable economic use has been denied, the right to develop has

been denied, the right to own property that has some economic value has been denied, so that it cannot even be marketed and sold -- the actions of the government have effected a taking.

B. The Economic Impact Of The Regulatory Actions Was To Render The Property Practically And Economically Useless.

Based on the evidence presented by Property Owner in the instant case the trial court found:

1. The land was acquired by Property Owner for future industrial use. (Finding of Fact 3)
2. At the time of acquisition the property was designated for industrial use by its specific zoning designation and in more general planning documents. (Finding of Fact 6, 7)
3. Prior to June of 1973 the property could be used for an industrial park. (Finding of Fact 27)
4. The course of conduct by the City, down-zoning some of the property from industrial to agricultural, identifying the property as "open space" land to be acquired by condemnation but later abandoning those efforts, identifying the land as "open-space" under the General Plan of the City, resulted in the deprivation of all practical, beneficial or economic use of the land. (Findings of Fact 12, 14, 15, 16, 17, 22, 23, 25, 26, 29)
5. No use or development (industrial or otherwise) consistent with the open space designation exists for this particular property. (Finding of Fact 30)
6. The property is unmarketable. (Finding of Fact 33)

Property Owner purchased the subject property for a purpose that was reasonable and permissible at the time of acquisition and well into the future. It paid fair market value for the property based upon the authorized industrial use. Following the actions of the City, Property Owner holds title to land which it can no longer use as intended nor make any other economic use of the land -- no industrial development is possible, no commercial development is possible, no agricultural use is possible, no residential use is possible, and the property is totally unmarketable.

The impact of and the effect of the regulatory actions of the City of San Diego on the subject land has not only caused a substantial devaluation of the property (*Kaiser Aetna, supra,* 444 U.S. at 180) but has completely destroyed the "economically viable use" of the land (*Agins, supra,* 100 S.Ct. at 2141).

C. The Regulatory Actions Have Destroyed The Reasonable Investment-Backed Expectations Of Property Owner.

Property Owner presented evidence that the subject property was the product of a unique, carefully planned assemblage of land designed for Property Owner's special needs and particularly suited for that purpose -- a site for future construction of a power plant. Moreover, because of the amount of land that was needed and the time, expense, complexity, and effort required to assemble such a parcel, this was an acquisition that was undertaken only after careful investigation, research, and preparation.

The intended industrial use was permissible at the time of acquisition and from all indications was to be the use permitted long into the future. All surrounding development and use was industrial, the zoning was industrial, and the future projections by the City for the area indicated future industrial use. Property Owner consulted and discussed with the City its intended industrial use for the parcel, and negotiated directly with the City in regard to the parcel when the City sold to Property Owner 25 of the acres it needed to assemble the parcel. Property Owner submits that its careful investigation and planning, and discussion with the appropriate authorities regarding its intended use amounting to tacit approval, resulted in the formation of sufficiently important expectations as to the use of the property so that the government should not be allowed to frustrate those expectancies without paying compensation to the owner. *Kaiser Aetna, supra,* 444 U.S. at 179.

Following the regulatory actions challenged here, the rezoning of the property, the abandoned overtures to purchase or condemn the property, the inclusion of the property in the open space element of the General Plan, and the resulting impossibility of using the property for its intended industrial use or any other use or even sale of property, the entire economic value of the property has been destroyed. Property Owner expended almost two million dollars to acquire land which is now useless and virtually worthless as private property. The only use remaining is the public use of an open space park reserve.[19] Such a total abrogation and frustration of a property

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[19] For all practical purposes, that has been its use for the last 7 years. The public purpose has been accomplished without payment of any compenstion--much less *just* compensation. See testimony of Mr. Frank DeVore. (Jt. App. 82)

owner's reasonable investment-backed expectations must be a "taking."

D. The Governmental Action In This Case Has Gone "Too Far" And Amounts To A Taking.

The balancing and weighing of competing interests supported by the teachings of this Court was in fact carefully carried out by the trial court on a fully developed record. That court concluded, as did Justice Holmes in *Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. at 415, that a regulation which goes too far must be recognized as a taking.[20]

The trial court found that Property Owner was left with land that was practically, beneficially, and economically useless. The only remaining use left for the land was as a public park, an "open space" area to be shared and enjoyed by the public as a whole. The trial court concluded that devotion of private land to such a uniquely public use, when balanced against the burden and cost it placed on Property Owner resulted in such actions being a "taking" of private property which under the Fifth Amendment required compensation.

Regulations, even those which further public goals or policies, nonetheless may go "too far," and when the effect is to cause an unduly harsh impact on the individual private property owner, frustrating the owner's legitimate economic

---

[20] And, incidentally, the same analysis was carried out with equal care and attention to detail by the Court of Appeal, with the like result in its first opinion, affirming the judgment for money damages, before the California Supreme Court's *Agins* decision rendered such analysis moot in California.

expectations, then it is no longer "fair" that one individual owner should bear such a burden which should in "fairness and justice," because of the public benefit, be borne by the public as a whole. *Armstrong v. United States,* 364 U.S. 40 (1960); *Pennsylvania Coal, supra,* 260 U.S. 393 (1922).

Such a conclusion is supported by the very purpose of the protection afforded by the Fifth Amendment which is

> "[to] redistribute certain economic losses inflicted by public improvement so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."
>
> *United States v. Willow River Power Co.,* 324 U.S. 499, 502 (1945).

III

THE JUDGMENT BELOW IS NOT PREMISED ON ADEQUATE STATE GROUNDS

The City has earlier suggested (Motion to Dismiss at 9) that the premise for the second decision by the Court of Appeal in the instant case, reversing the trial court, was the determination that Property Owner had failed to exhaust its administrative remedies and thus argues that the decision rests on adequate state grounds. The premise of the decision and the holding of the court below, now challenged before this Court, is abundantly clear:

> "the individual who is deprived of his property due to the state's exercise of the police power is not entitled to compensation. . . ."
>
> . . . .
>
> "[the] exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation. . . ."
>
> . . . .
>
> "Even assuming no use is [possible] . . . [the] complaint deals with over-zealous use of the police power . . . [the] remedy is mandamus or declaratory relief, no[t] inverse condemnation"
>
> (Jt. App. 66).

The Court of Appeal did not dispute or challenge Property Owner's contention, and the trial court's determination following presentation of all the evidence, that the effect of the regulatory actions was to deprive Property Owner of all economic use of its property. What the Court of Appeal held was that such regulatory (police power) actions can *never* amount to a "taking" in the constitutional sense and can *never* give rise to an action to recover monetary compensation.

There is no independent or adequate state ground for such a holding. Such a position directly, flatly and blatantly contradicts and ignores the protections afforded by the Fifth Amendment as interpreted by this Court.

The exhaustion of administrative remedies is not[21] an issue that is before this Court not should it be addressed by the Court, for it was raised, addressed and properly resolved under existing California state law by the courts below.

Property Owner has consistently maintained that it was not required to exhaust administrative remedies, since no administrative remedy existed for this constitutional violation and further that to have attempted to pursue such an imagined remedy would have been a useless and futile act.

The trial court agreed and found, based on the evidence presented, that

> "it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space. . . ."
>
> (Finding of Fact 32.) *See also,* Jt. App. 42 [R.T. 411-413].

In the "first appeal" to the state Court of Appeal the court specifically and at some length (Jt. App. 54) rejected City's contention that Property Owner had failed to exhaust its administrative remedies, finding that under existing California law there was no failure to exhaust (relying on *Sneed v. County*

---

21 The notation by the court that Property Owner had not applied for a permit was not a ruling that there had been a failure to exhaust administrative remedies for the court in the very next sentence observed that it would have made no difference since the fact remained that Property Owner could never bring an inverse condemnation action.

of Riverside, 218 Cal.App.2d 205 (1963)[22] and in any event to have applied for any use or development permit or zoning change would have been a futile and useless act.

The court in reaching that decision noted that the definition of open space in the City of San Diego's General Plan was land that is "essentially open or natural . . . appreciable for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes." (Jt. App. 52.) The state court also noted that the trial court found based on the evidence presented at trial, that the City as a matter of policy required the use of land to be consistent with its open-space designation (Jt. App. 54) and that it was "inconceivable" that the City would permit an industrial use in an open space area (Jt. App. 55).

The Court of Appeal's resolution of the exhaustion question is correct under California law.

In *Ogo Associates v. City of Torrance,* 37 Cal.App.3d 830, 834 (1974) the Court recognized that the exhaustion doctrine is not an inflexible dogma, finding that "pursuit of futile administrative remedies in order to invoke the jurisdiction of the courts" is not necessary.

---

22 In *Sneed* the California courts distinguished between cases where a property owner desires exemption from what existed before and other instances where the government by its regulatory action has "invaded the alleged property rights of plaintiff and in response plaintiff does not challenge the constitutionality of the ordinance but merely seeks damages in inverse condemnation. . . ." 218 Cal.App.2d at 212. See also *Ramos v. County of Madera,* 4 Cal.3d 685, 691 (1971) (The rule has no application where the remedy is unavailable or inadequate).

The *Ogo* court excused plaintiff from seeking a variance from the zoning ordinance since the evidence presented by the plaintiff demonstrated that it was "inconceivable," the variance would be granted and that to require them to do so would be "to require them to pump oil from a dry hole." *Ogo Associates, supra,* 37 Cal.App.3d at 834.

Only last year in *Furey v. City of Sacramento,* 24 Cal.3d 862 (1979) the California Supreme Court recognized a property owner's right to challenge a zoning ordinance without first applying for a variance since a review of the ordinance and the desired use revealed a fundamental incompatibility and it was clear that no other use would have been allowed. *Accord, Eldridge v. City of Palo Alto,* 57 Cal.App. 613, 632-633 (1976) (disapproved on other grounds in *Agins, supra,* 24 Cal.3d 266).[23]

If failure to exhaust available administrative remedies had been a "flaw" in Property Owner's case, the court would have so found in the "first appeal." The California Supreme Court, which requested the court to reconsider the instant case in light of *Agins* had stated, albeit in dictum, that challenges to regulatory actions do not give rise to an inverse condemnation action or entitle the owner to a damage remedy. The state Court of Appeal concluded, from its reading of *Agins* that regulatory "police power" actions can simply never give rise to inverse

---

[23] As the court noted in *Dahl v. City of Palo Alto,* 372 F.Supp. 647, 649 (N.D.Cal. 1973) in responding to the claim that there had been a failure to exhaust administrative remedies by applying for a sue permit, "It is highly improbable a variance would . . . be granted where development would be completely contrary to the goal of preserving the land in its natural or near natural state."

condemnation action and the awarding of damages. On that basis, and that basis alone, the court reversed the judgment.

There is no adequate state ground for the decision. The decision below, based on the rationale expressed by the California Supreme Court in *Agins*, is in direct conflict with the mandate of the Fifth Amendment and as such raises a substantial federal question which must be resolved by this Court.

IV

MONEY DAMAGES, NOT INVALIDATION, PROVIDE "JUST COMPENSATION" IN TAKING CASES.

A. The Precedents Of This Court Uniformly Support The Award of Money Damages.

"Whether a State may limit the remedies available to a person whose land has been taken" to those of mandamus or a declaratory judgment, was an issue noted, but not considered by this Court only last term. (*Agins v. City of Tiburon, supra,* ____ U.S. ____, 100 S.Ct. at 2143.) The issue is squarely presented in this case.

In the instant case, following a full presentation of evidence, the trial court found that there had been a "taking" and that under the Constitution, Property Owner was entitled to monetary compensation.

After originally affirming the trial court in all respects the Court of Appeal reconsidered the case in light of the rationale expressed by the California Supreme Court in its *Agins,* opinion and concluded that challenges to regulatory actions never give rise to an inverse condemnation cause of action.

In *Agins*, the California Supreme Court in dictum, concluded:

> "The need for preserving a degree of freedom in the land use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuades us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief. . . ." 24 Cal.3d at 274, 276-277.

Premised on this, not surprisingly, the court below concluded that even though Property Owner had been denied all use of its land, "inverse condemnation" is not available as a cause of action to challenge the effect of the regulatory action and that money damages are not available.

The stunningly absolutist approach of the California Supreme Court in *Agins*, followed by the Court of Appeal in the instant case, finding the very remedy mandated by the language of the Fifth Amendment - compensation - as an "undesirable" and "inappropriate" remedy that is never available when the regulatory actions of a governmental body are challenged, even though there has been a denial of all use - a "taking" - is shocking and in flat contradiction to the mandate of the Fifth Amendment - private property shall not "be taken for public use, without *just compensation*."

The arguments previously advanced by the City and by numerous others in favor of the position advanced in *Agins*, all have their foundation in a concept rejected by this Court long ago. Reduced to its essence, the position is that regulatory "police power" actions can never effect a "taking" of private property.

See discussion above at 16-18. Realizing the problems of that argument, its proponents adopt a variation or fall-back position that even if it is assumed regulatory actions somehow amount to a "taking," nonetheless a "regulatory" taking is a different kind of "taking" than a "physical" taking and "just compensation" need only be paid when there is a physical taking of property. Property Owner submits that such a distinction is nothing more than another attempt to sever and isolate police power actions from the constitutional consequences of a taking and is a theory that is fundamentally at odds with the Fifth Amendment and the precedents of this Court interpreting the Fifth Amendment.

Since the focus of the Court in determining whether a "taking" has occurred does not distinguish between physical or non-physical interference, but whether there has been an interference with the fundamental attributes of property rights, there is no basis for arguing that the manner in which the taking is accomplished somehow determines and changes what remedy is available or what "just compensation" means.

The importance and availability of a damage award for the violation of constitutional rights has only last term been reaffirmed by this Court when it specifically and emphatically held that damage compensation is available and is to be awarded when constitutional rights are violated by cities, regardless of the good faith of the action taken. *Owen v. City of Independence,* ____ U.S. ____, 100 S.Ct. 1398 (1980).

The lower court here acknowledged that the trial court found the excessively burdensome regulations to be a violation of the constitutional rights guaranteed by the Fifth Amendment (Jt. App. ____) and yet denied the availability of the damage remedy in an inverse condemnation action.

This Court in *Owen* responded to the argument, similar in rationale to that advanced by the California Supreme Court in *Agins*, that the threat of damage awards would excessively burden the governmental process, by stating:

> "A damage remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficiency is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.
>
> . . . .
>
> To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'etre*."
>
> 100 S.Ct. at 1415, 1418.

While Property Owner acknowledges that this Court was addressing personal, rather than property, rights in finding a damage remedy available under 42 U.S.C. § 1983, this Court has previously noted that any supposed dichotomy between personal and property rights is a false one, for a "fundamental interdependence exists between [them]" and "[n]either would have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

That the inverse condemnation cause of action with its damage remedy is available to a property owner who alleges his property has been "taken" by the government was noted in *United States v. Clarke, supra,* ____ U.S. ____, 100 S.Ct. 1127.

There the court found that an "inverse condemnation" cause of action arises because the effect of governmental actions is "as if the government had taken his property under its sovereign right of eminent domain", ". . . even though no formal exercise of the power of eminent domain has been attempted. . . ." and gives rise to "a cause of action against a governmental defendant to recover the value of property which has been taken. . . ." *Clarke, supra,* ___ U.S. ___, 100 S.Ct. at 1129, n. 2, 1130.

The court in *Clarke* found that the right to "sue for damages" in inverse condemnation is based on the theory that the property owner is entitled to sue to "stop" the action or to waive that and demand money damages instead. *Clarke, supra,* ___ U.S. ___, 100 S.Ct. at 1129, n. 2, citing *United States v. Lynah,* 188 U.S. 445 (1903).

Previous decisions of this Court defining the concept of "just compensation" support the position that money damages are available as a remedy. This Court has stated that "just compensation" requires that the owner of taken property be compensated by receiving in return what is the equivalent of the taken property's value. *Danforth v. United States,* 308 U.S. 271, 283 (1939); *Olson v United States,* 292 U.S. 246, 255 (1934); ("the market value . . . paid in money"); *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893). (". . . full and exact equivalent").

That a damage remedy has always been contemplated as a remedy available to the property owner whose land has been "taken" can be seen from a review of the language used by this Court throughout the years in its discussions of the remedy available to the property owner in a "taking" situation.

"[N]o private property shall be appropriated to public uses unless *a full and exact equivalent* for it be returned to the owner."

Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). (Emphasis added)

"[For] a taking and appropriation within the scope of the 5th Amendment to the Constitution . . . the government is *to pay the* value of the property so appropriated."

United States v. Lynah, 188 U.S. 445, 461 (1903) (Emphasis added)

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by shorter cut than *the constitutional way of paying for the change.*"

Pennsylvania Coal, supra, 260 U.S. at 425. (Emphasis added)

"[The property owner] is entitled to be put in as good a position *pecuniarily* as if his property had not been taken."

Olson v. United States, 292 U.S. 246, 255 (1934). (Emphasis added)

"[*P*]*aying* just compensation . . . through action of the owners in the courts."

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 291 (1958). (Emphasis added)

> "[Whether] the economic injuries caused by public action [are to] be compensated '[and require the government] *to pay* for any losses . . .' depends largely 'upon the particular circumstances [in that] case.'"
>
> *Penn Central, supra,* 438 U.S. at 124. (Emphasis added)
>
> "[The government] must nonetheless *pay* just compensation. . . ."
>
> *Kaiser Aetna, supra,* 444 U.S. at 180. (Emphasis added)
>
> "Inverse condemnation [is] . . . the manner in which the landowner recovers just compensation for a taking . . . [and] is 'a cause of action against a governmental defendant *to recover the value of the property.* . . .'"
>
> *United States v. Clarke,* ____ U.S. ____, 100 S.Ct. at 1129. (Emphasis added)

Property Owner contends that the Constitution guarantees it, and all other property owners, a remedy of money damages for the taking of its property, whether by regulation or physical seizure, and that anything less, while perhaps socially desirable in the eyes of some, is not "just compensation."

B. Invalidation Is Not "Just Compensation."

A further requirement for "just" compensation according to this Court is that "at the time of the taking" there must be "reasonable, certain and adequate provisions for obtaining compensation." *Regional Rail Reorganization Act Cases,* 419

U.S. 102, 124-125 (1974) quoting from *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890); *Bauman v. Ross*, 167 U.S. 548 (1897).

Judged by this standard the alleged remedy provided by the California courts is totally inadequate and cannot be sanctioned by this Court.

The finding of the trial court, twice affirmed by the Court of Appeal, is that Property Owner has been, as of June, 1973, deprived of all beneficial, economic, and practical use of its property by the *course of conduct* of the City.

The supposed "just compensation" offered to Property Owner in 1980, which has been and will continue to be, denied all use of its land, is to "retry the case" seeking mandamus or declaratory relief to "invalidate" the challenged action. The court never addressed the problem of how it was possible to invalidate a course of conduct, but even if it is assumed to be possible, how this would "justly compensate" the property owner whose land was found to have been taken in 1973 - 7 years ago.

The very heart of the concept involved in the Fifth Amendment is to socialize the burden that has been imposed because it is unfair to ask one property owner by himself to bear a burden that should "in all justice and fairness," be borne by the public as a whole. *Armstrong, supra,* 364 U.S. at 49. See also *Willow River, supra,* 324 U.S. at 502. During the period of challenge to the validity of various governmental actions, the individual would have to carry the full weight of a burden which the court has already determined was not his to bear. Property Owner submits this cannot be "just" compensation.

non-compensatory nature of invalidation is particularly true in California, where existing state law (*Selby v. City of San Buenaventura,* 10 Cal.3d 110 (1973)) permits a governmental entity to change the regulation even after trial and judgment, thus allowing the procedure and the challenge "to start all over again."[24]

> "Even where courts do invalidate, . . . invalidation is probably little deterence to excessive regulation. Invalidation is merely a judicial slap on governmental hands. It costs the government nothing except face and the cost of litigating. The court does not even order a particular regulation; it merely invalidates the one that applied. An obdurate government can regulate almost exactly the same again and leave the property owner with another round of exhausting litigation to the relevant highest court, after

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[24] The awareness of this possibility, and thus the possibility for abuse, can be seen by the following comments of the City Attorney of Thousand Oaks, California:

> "If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby v. City of San Buenaventura,* 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment make it more reasonable, more restrictive, or whatever, and everybody starts over again.'" Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation),* 38B NIMLO Municipal Law Review 175, 192 (1975).

> which the regulation can be modified only slightly again, leading yet to another round."
>
> Hagman and Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation,* at 293-294 (1978).

Invalidation, through mandamus or declaratory relief, even if it can be attained, is not compensation and cannot be deemed to be the "just" compensation required by the Fifth Amendment to be given when private property has been taken.[25]

CONCLUSION

Prior to 1979, the Fifth Amendment had vitality in California in protecting private property rights from unreasonable restriction by government.

Property Owner herein, faced with oppressive regulatory action, filed a suit in inverse condemnation. After a trial at which all relevant considerations were developed on the record, the trial judge weighed and balanced the competing considerations under the classic formulation uniformly expounded by this Court for decades, and determined that there had been, in fact, a "taking" in the constitutional sense. Money damages were determined and awarded. The Court of Appeal affirmed, finding substantial evidence in the record to support the judgment for money damages.

---

[25] With the aim of illustrating the absolute inadequacy of the invalidation remedy, a hypothetical, but unfortunately realistic, scenario of a property owner's experience in Southern California is set forth at Jt. App. 165, Appendix A. Due to its length it is included in the Appendix rather than as a footnote.

Comes 1979 -- enter the California Supreme Court which with a flourish of social experimentation -- in utter disregard of the Fifth Amendment -- and declares that a property owner can *never* recover money damages for a "regulatory" taking.

The Court of Appeal, with understandable deference to the highest state court, was forced to repudiate its previous analysis of the case, recant its previous opinion on the same record, and erase the judgment for money damages.

Property Owner herein now appeals to this Court to urge that this alarming and unconstitutional detour from settled constitutional pathways be halted and the Fifth Amendment revitalized in California.

It is respectfully requested that the decision of the Court of Appeal be vacated and the judgment of the trial court affirmed.

Respectfully submitted,

LOUIS E. GOEBEL

RUTH R. MIJUSKOVIC

GUENTER S. COHN

Attorneys for Appellant

No. 79-678

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
a corporation,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation; PETE WILSON, Mayor; F. GILBERT JOHNSON, MAUREEN O'CONNOR, LEE HUBBARD, LEON L. WILLIAMS, FLOYD L. MORROW, JIM BATES, ROBERT MARTINET, and JAMES ELLIS, Members of the City Council of San Diego; JAMES L. GOFF, Planning Director of the City of San Diego; and DOES I through XXV, inclusive,

Appellees.

On Appeal From The California Court Of Appeal,
Fourth Appellate District, Division One

BRIEF OF APPELLEE

C. ALAN SUMPTION, Deputy City Attorney
JOHN W. WITT, City Attorney
Litigation Division
233 "A" Street, Suite 300
San Diego, California 92101
Telephone: (714) 236-7221

Attorneys for Appellees

October 1980

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

QUESTIONS PRESENTED*

1. Did the regulatory actions and/or conduct of the City of San Diego have the effect of denying appellant all reasonable, beneficial use of its property in violation of the Fifth and Fourteenth Amendments of the United States Constitution?

2. If the answer to the preceding question is yes, do the Fifth and Fourteenth Amendments compel a remedy of inverse condemnation, forcing the purchase of the property by the public entity imposing the regulations where no physical invasion takes place, no existing use is disturbed, and where no intent to condemn property was present, as opposed to invalidation, injunction or other form of relief?

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* Pursuant to Rule 34.2, appellee restates the questions presented, but by doing so does not concede that the Court has jurisdiction. The jurisdictional issues are presented in that section of this brief.

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BRIEF OF APPELLEE

JURISDICTION

In response to appellant's jurisdictional statement, appellee filed a motion to dismiss, raising jurisdictional issues.

This Court, by its order of June 16, 1980, postponed consideration of the question of jurisdiction to the hearing on the merits.

Appellant asserts jurisdiction by appeal under 28 U.S.C. Section 1257(2), or alternatively by writ of certiorari under 28 U.S.C. Section 2103.

Appellee contends that the federal question sought to be reviewed was not expressly passed on; the judgment rests on an adequate nonfederal basis; and the appeal does not present a substantial federal question.

1. Appellant Has Not Drawn Into Question The Validity Of A Statute As Being Repugnant To The Constitution.

Both 28 U.S.C. Section 1257(2) and 28 U.S.C. Section 1257(3) provide jurisdiction where a statute is claimed to violate the Constitution.

Appellant has not contended that legislative enactments in themselves had the effect of violating the Constitution--rather it has claimed, and the trial court found, that a "continuing course of conduct," including rezoning of some of its property, adoption of an open space plan, preparation of open space financing plans, placing bond propositions on the ballot and other planning activities constituted a "taking" of its property.

Appellant's theory of the case rests not on the effect of legislation on its property, but on a course of conduct which it perceives as being based upon illicit motive to acquire its property for open space at a reduced value or to preclude any use so that acquisition is unnecessary.

The motives of legislators in enacting legislation is irrelevant to the issue of constitutionality of the legislation. *United States v. O'Brien,* 391 U.S. 367, 383 (1968). This rule is adhered to in California with the exception of unreasonable precondemnation conduct. *Pinheiro v. County of Marin,* 60 Cal.App.3d 323, 327-328 (1976). The exception is not dependent upon the validity of the legislation and the remedy for such actions is recovery of damages in the eminent domain action. *Klopping v. City of Whittier,* 8 Cal.3d 39, 52 (1972).

2. The Open Space Plan Is Not A "Statute".

The term "statute" as used in 28 U.S.C. Section 1257(2) has been interpreted to mean "any enactment from whatever source originating, to which a State gives the force of law." *Lathrop v. Donohue,* 367 U.S. 820, 824 (1961). The adoption of an open space plan by a city council resolution, while arguably an "enactment," does not have the force of law in that it is merely a planning designation. *Selby Realty Co. v. City of San Buenaventura,* 10 Cal.3d 110, 119-120 (1973).

3. The Decision Appealed From Did Not Hold Legislation Valid.

The opinion appealed from does not hold the zoning ordinance and open space plan valid nor invalid. Instead, it states that the assertions that appellee City arbitrarily exercised the police power by enacting an unconstitutional zoning law and open space plan or applying them unconstitutionally are disputed fact issues not covered by the trial court.

In order for jurisdiction to lie under 28 U.S.C. Section 1257(2), the decision appealed from must have passed on the validity of the statute. *Wilson v. Cook,* 327 U.S. 474, 481 (1945). Something more than a claim of federal right is necessary; the attack must be upon the *validity* of the

order, not merely upon the court's judgment. *Live Oak Water Users' Asso. v. Railroad Commission,* 269 U.S. 354, 357 (1925).

4. The Judgment Rests On An Adequate Nonfederal Basis.

The issue of appellant's failure to exhaust its administrative remedies by applying for development permits on its property or relief from the land use restrictions was raised by appellee at trial and the appeals.

By the Court of Appeal reciting that appellant made no application for use of its property and then stating, "Even assuming no use is acceptable . . ." it is apparent that the Court of Appeal felt appellant had not established a denial of all use of its property. It is well settled law in California that the doctrine of exhaustion of administrative remedies applies to constitutional challenges of zoning ordinances. *Metcalf v. County of Los Angeles,* 24 Cal.2d 267 (1944).

This Court should therefore dismiss this appeal as the decision is based upon state law rather than a federal question. *Copperweld Steel Co. v. Industrial Com.,* 324 U.S. 780, 785 (1944).

5. The Appeal Does Not Present A Substantial Federal Question.

a. The Decision Of The Court Of Appeal Is Not As Sweeping As Appellant Suggests

The decision below does not hold, as appellant contends, that a property owner may *never* recover money damages as a remedy for an unconstitutional exercise of the police power.

It merely states that such an exercise of the police power does not "require" compensation, citing the case of *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979), and is obviously limited to the facts here. Among those facts are: Appellant's failure to apply for development of its property; no use of the property by appellant; no actual public use of the property; no formal actions by the City to condemn the property or firm declaration of intent to condemn it; the City's engaging in mere planning

activities for potential acquisition; and rezoning of portions of the property which recognized the nature of the property.

The Court of Appeal decision here, as well as the *Agins v. City of Tiburon, supra,* 24 Cal.3d 266 case, did not disturb the line of cases involving unreasonable precondemnation conduct where money damages may be awarded. *Agins, supra,* at pp. 277-278.

b. The Fifth Amendment Does Not Compel A Remedy Of Forced Purchase Of Property By Way Of Inverse Condemnation For Exercises Of The Police Power Which Exceed Constitutional Limits

This point is discussed in the argument below.

STATEMENT OF THE CASE

Appellant's statement of the case is argumentative, contains errors of fact and is misleading due to certain omissions of fact. The salient facts to the case are as follows:

1. The Subject Property.

The real property owned by appellant ("SDG&E") which is the subject of this litigation lies in the northwest part of San Diego, in the southwest quadrant of the intersection of Interstate Highway I-5 and Carmel Valley Road. The freeway abuts the property to its east. To its west is the Torrey Pines State Park and the Pacific Ocean.[1]

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[1] See Plaintiff's Exhibit 1 [Reporter's Transcript (R.T.) 6, 61]. For convenience, a map, which is not part of the record, is contained in Appendix A herein, to show the location of the property.

The property which was described in SDG&E's complaint constitutes about 255 to 260 acres[2] and was acquired by SDG&E in 1966 as a potential site for a nuclear power plant, including a buffer zone.[3] It was purchased by SDG&E for the sum of approximately $1,770,000.00.[4]

The property is at a low elevation and is a drainage basin and floodplain at the confluence of three river systems that drain approximately 100 square miles.[5] It is characterized as tidal flats or marshland[6] and a portion is subject to ocean tidal action.[7]

The property is referred to as the Los Penasquitos Lagoon, and is an estuary or wildlife refuge.[8] It is also subject to ponding resulting from rain.[9]

The zoning on the subject property when acquired by SDG&E and up to the rezoning in 1973 consisted of approximately 116 acres in the M-1A

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2 Clerk's Transcript (C.T.) 125:17-18; R.T. 9:16. Subsequently stipulated to be: 229 acres plus 3.62 acres leased (all east of railroad tracks). Parcel west of tracks is 12.85 acres. R.T. 705.

3 R.T. 8:5-10; C.T. 125:11-14. Additional properties were purchased by SDG&E for this purpose to the north of Carmel Valley Road and to the east of Interstate I-5, making a total of 412 acres (see map, Appendix A). C.T. 125:14-16; R.T. 6:23-26--7:1-11; 8:11-12. The property was acquired as an assemblage from several different owners. R.T. 125:11-20; R.T. 8:9-11; 9:20-22.

4 R.T. 9:19.

5 R.T. 311:10-11; 312.

6 R.T. 7:1-2.

7 R.T. 925:13-23; Plaintiff's Exhibit 16 [R.T. 102, 106].

8 C.T. 126:5-7; R.T. 147-148; 311:8-9; 537:12-13.

9 R.T. 312:9-11; 929:12-19; Defendant's Exhibits N, O, P and Q [R.T. 920, 1108].

Zone[10] (industrial). 112 acres in the A-1-1 Zone[11] (agricultural or holding), and 13 acres in the R-1-5 Zone[12] (single family residential).[13]

All but a small portion of the property (at the extreme southeast end) lies within the California Coastal Zone[14] as described by the California Coastal Zone Conservation Act of 1972 and was subject to the provisions of that Act requiring permits for development.[15]

The majority of the property was designated for industrial use by San Diego's first general plan in 1967 and remained so designated. The remaining portion was designated as "area for future growth" by the general plan.[16]

In order to utilize the 150 acres physically adaptable for industrial use it was necessary that three to four feet of fill soil be placed over the property to surcharge (compact unstable soils) the natural soil and to elevate structures to protect against flooding.[17]

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10 Relevant portions of this zone, then in effect, adopted by Ordinance No. 9408 (New Series) are set forth in Appendix B herein. Federal Rules of Evidence, Rule 201.

11 Relevant portions of this zone adopted by Ordinance No. 8706 (New Series) are set forth in Appendix C.

12 Single family dwelling units--minimum 5,000 square foot lot.

13 C.T. 126; Plaintiff's Exhibit 1 [R.T. 6, 61]. For convenience, a map which is not part of the record, is included in Appendix D herein to show the various zoning on the property.

14 R.T. 150-151; 931:1-4; 952:12-15.

15 California Public Resources Code, Section 27000, *et seq.* added by initiative act. Succeeded by the California Coastal Act of 1976, Pub. Res. Code, Section 30000, *et seq.* Pub. Res. Code, Sections 27104, 27400.

16 Plaintiff's Exhibit 9 [R.T. 22, 61].

17 R.T. 130, 132-133; Joint Appendix [J.App.] 116.

Since its purchase, the property has not been developed or used by SDG&E with the exception of utility easements and a single family residence, and is currently in the same state.[18] SDG&E has never applied to the City to develop the property.[19]

2. The City's Actions--Rezoning.

In 1972 the San Diego City Council initiated hearings to consider rezoning the subject property as well as property to the south and west.[20] The Council's concern arose at a zoning hearing on hillside property to the north when the adverse effects on the Los Penasquitos Lagoon was brought to the Council's attention.[21]

As a result of the rezoning hearings, portions of the subject property as well as adjoining properties were rezoned by the adoption of an ordinance on June 21, 1973.[22]

As it affected SDG&E's property, the 38 acres in the northwest were rezoned from M-1A to A-1-10, the 13 acres to the north from R-1-5 to A-1-10, and the 50 acres to the northeast from A-1-1 to A-1-10.[23] Approximately 79 acres zoned M-1A and 48 acres zoned A-1-1 were unchanged.

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18 R.T. 69:11-13; 153:4-7; 530:13-15.

19 R.T. 153:4-7.

20 R.T. 23:23-26; 24:1; 379:7-26; 380:1-7.

21 R.T. 379:7-19.

22 Plaintiff's Exhibit 43 [R.T. 645, 828]. Jurisdictional Statement Appendix (J.S.App.) K-12; R.T. 382:2-6. The rezoning ordinance was introduced on June 7, 1973. J.App. 40, No. 22.

23 Plaintiff's Exhibit 1 [R.T. 6, 61]; R.T. 34; 380:15-26; 381-382. For convenience, a map, not part of the record, is included in Appendix E herein showing the result of the rezoning in 1973 (compare with Appendix D).

The City Planning Department recommended, and the City Council agreed at the rezoning hearing, to retain the southeastern portion of the property in the A-1-1 Zone, but that future rezoning to light industrial use would be appropriate upon application and appropriate mitigating measures.[24]

The Planning Department believed that the rezoning would provide a zoning pattern that recognized the unique environmental characteristics of the area.[25]

3. The City's Actions--Open Space.

In 1970 and 1971 the California Legislature enacted open space planning laws requiring open space planning as part of the general plan.[26]

During the early part of 1972 the City Planning Department began to prepare an open space plan to meet the state mandated deadline of June 30, 1973.[27] This effort culminated in the adoption of an open space plan entitled, "A Plan For The Preservation Of Natural Parks For San Diego" (hereinafter "Open Space Plan") on June 19, 1973.[28]

The Open Space Plan encompassed some 51,000 acres within San Diego, 11,000 acres recommended for acquisition and 17,000 acres designated for "limited development under zoning."[29]

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24 Plaintiff's Exhibit 43 [R.T. 645, 828]; R.T. 34:14-18; 35:7-12; 381:10-17.

25 Plaintiff's Exhibit 43 [R.T. 645, 828].

26 California Government Code, Sections 65302(e), 65561, 65563 (J.S.App. K-5; K-6).

27 California Government Code, Section 65563. The deadline was extended to December 31, 1973 by amendment on June 29, 1973. R.T. 161-164.

28 Plaintiff's Exhibit 11 [R.T. 36, 39]; J.App. 41, No. 23; J.S.App. K-10.

29 Plaintiff's Exhibit 11, p. 15 [R.T. 36, 39].

As the Open Space Plan affected SDG&E's property, 214 acres were designated as open space and proposed for acquisition.[30]

In the early part of 1972, the City Community Development Department began planning for City acquisition of open space lands. This department prepared a staff report entitled, "Park Reserve Systems," dated April 29, 1973,[31] which discussed the financing and acquisition of park reserve lands.

The Community Development Department obtained rough estimates of value of properties, including portions of SDG&E's, proposed to be acquired in the preparation of the report and for a bond ballot proposal.[32]

On April 17, 1973, the City Council adopted a resolution determining that the public interest and necessity demand the acquisition and improvement of park reserve areas to be subsequently identified and authorizing bonded indebtedness for said purpose.[33] Said resolution was a prerequisite for incurring bonded indebtedness under San Diego City Charter Section 90.[34]

In September of 1973 a ballot proposition for bonds to purchase open space lands in the City failed to be adopted by the required vote of the electorate.[35]

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30 Plaintiff's Exhibits 1 [R.T. 6, 61]; 11 [R.T. 36, 39] and 11a [R.T. 38, 39]; R.T. 705-706. See Appendix F herein for illustration.

31 Plaintiff's Exhibit 14 [R.T. 44, 61]. The purpose of the report was stated as ". . . establishing a broad guideline for future acquisition. . . ." It provides: "It is not the intent, by creating this report . . . to specifically designate any particular property for acquisition. . . ." (at p. 1).

32 R.T. 237-239; 397; 399.

33 Plaintiff's Exhibit 24 [R.T. 242, 302]; J.S.App. K-8.

34 Relevant portions of Charter Section 90 are set out in Appendix G herein.

35 R.T. 244; J.App. 41, No. 25.

No eminent domain action was filed by the City to acquire SDG&E's property, no resolution authorizing condemnation was adopted, and no monies were appropriated for the acquisition of the property.

A hearing on the Open Space Plan before the Planning Commission commenced on May 16, 1973, and was continued to May 23, 1973. During the intervening week changes were made to the text of the proposed plan and in the amount of the property designated as open space. The changes in acreages were due in part to discrepancies between efforts of the Community Development Department and the Planning Department which were discovered at the initial Planning Commission hearing.[36]

One of these changes involved the SDG&E property. The effect of the change was to propose more of the SDG&E property be designated for open space.[37]

A change in the text affecting the SDG&E property was the addition of language to the effect that a nuclear power plant, depending upon design and siting, could be compatible with open space.[38] This change was brought about by representatives of SDG&E expressing concern over the effect of the plan on its property during the continued hearing.[39]

The changes that were made in the proposed open space plan were reflected in an addendum which was made available at the continued

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36 R.T. 70-72; 169; 224-226.

37 Compare Plaintiff's Exhibit 10a [R.T. 31, 39] with 11a [R.T. 38, 39]. Approximately 114 additional acres were included in the revised plan as opposed to approximately 102 acres originally proposed. R.T. 31:22-26; 36:11-26.

38 Plaintiff's Exhibit 11, p. 24 [R.T. 36, 39]; J.App. 160.

39 R.T. 70:9-26; 71; 72.

hearing on May 23, 1973,[40] and in large exhibit maps used at the hearings, but the maps and text in the plan booklets which had previously been distributed were not changed for the continued hearing.[41]

On March 6, 1975, the City Council adopted the Torrey Pines Community Plan, which included the SDG&E property.[42] In that community plan, which was incorporated into the City general plan on June 26, 1975,[43] only the northerly portion (approximately 100 acres) of the subject property was designated as open space.

4. The Litigation.

SDG&E filed the complaint on August 15, 1974. The complaint, as amended, alleged that the actions of the City and its officers and employees were arbitrary, oppressive, unreasonable exercises of the police power and constituted an unlawful taking or damaging of its property, and as a result SDG&E was denied any possible beneficial use of its property.[44]

SDG&E also sought declaratory and injunctive relief on the basis that the rezoning and Open Space Plan were invalid and unconstitutional because adopted without notice, and were arbitrary, oppressive and unreasonable.[45]

A separate trial on the issue of liability commenced on January 19, 1976, by the court without a jury.

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40 Defendant's Exhibit A [R.T. 180, 395]; R.T. 179; 206.

41 R.T. 179; 226; Plaintiff's Exhibits 20 and 21 [R.T. 167, 184].

42 Defendant's Exhibits D [R.T. 345, 394] and E [R.T. 346, 394].

43 Defendant's Exhibit F [R.T. 346, 394].

44 C.T. 3-8; J.App. 6-11.

45 C.T. 38-40; J.App. 32-34.

The trial court concluded that the 214 acres of SDG&E's property which had been designated as open space in the Plan had been taken by the actions of the City as of June 19, 1973, that SDG&E had suffered severance damage to remainder parcels[46] and approved findings of fact and conclusions of law.[47]

The second phase of the trial proceeded on the issue of fair market value of the property deemed taken. A judgment was entered pursuant to a jury verdict awarding $2,886,300.00 as the fair market value of the parcel taken, $283,696.00 in severance damages to the remainder parcels, and $122,559.07 in fees plus interest on the value of the property taken and severance damages.[48]

City appealed the issue of liability to the Court of Appeal, Fourth Appellate District, Division One.

The Court of Appeal upheld the judgment on May 17, 1978. City sought a rehearing based on factual errors, misstatements of City's position, errors of law and other grounds. On June 13, 1978, the Court of Appeal modified its opinion and denied a rehearing by a two-to-one vote.[49]

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46 R.T. 411; 413:10-24; 705; C.T. 210:25-26; 211:1-5. The remainder parcels are located between Sorrento Valley Road and Interstate I-5 and comprise approximately 19 acres. R.T. 706.

47 C.T. 203; J.App. 35.

48 C.T. 263; J.App. 44.

49 J.App. 48; J.S.App. C-1.

The California Supreme Court granted a hearing on July 13, 1978.[50] On June 14, 1979, it transferred the case back to the Court of Appeal for reconsideration in light of its decision in *Agins v. City of Tiburon, supra,* 24 Cal.3d 266.[51]

Throughout its appeals City has maintained that there is no substantial evidence in the record which supports the trial court's findings to the effect that: City's actions deprived SDG&E of all practical, beneficial or economic use of its property; it would have been futile for plaintiff to have applied to City for development of its property; and the property had been devoted to use by the public as open space.

The Court of Appeal reversed the judgment in an opinion not certified for publication stating:

> [SDG&E] has not made application to use or improve the property nor has it asked City what development might be permitted. Even assuming no use is acceptable to the City, Company's complaint deals with the alleged overzealous use of the police power by City. Its remedy is mandamus or declaratory relief, not inverse condemnation. Company did in its complaint seek these remedies. . . . However, on the present record these are disputed fact issues not covered by the trial court in its findings and conclusions.[52]

SDG&E was denied a rehearing in the Court of Appeal and a hearing in the California Supreme Court.[53] Thus, it is from the unpublished opinion of the Court of Appeal that SDG&E seeks this appeal.

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50 J.S.App. D-1. The effect of the granting of a hearing is to supersede and render the Court of Appeal decision a nullity, of no force or effect. California Rules of Court, Rule 976(d); *Knouse v. Nimocks,* 8 Cal.2d 482, 483 (1937).

51 J.S.App. E-1.

52 J.App. 63, 66.

53 J.S.App. H and I.

SUMMARY OF ARGUMENT

1. The Record Does Not Support The Finding That The Regulations Effectively Denied All Reasonable Use Of The Property.

The trial court's findings of fact have been rejected by the Court of Appeal. The decision below states that SDG&E has made no application to develop its property but does not agree with the trial court's finding that SDG&E was excused from doing so and it held that there are disputed fact issues not covered by the trial court.

a. The rezoning affected only 100 acres out of the total 228 acres of the property. Of the 100 acres rezoned, only 38 acres changed the basic use (from industrial to agricultural). That 38 acres was subject to ocean tidal action and is a wildlife sanctuary where development would be impractical according to SDG&E. Industrial zoning remained on parts of the property and industrial use was allowed by conditional use permit on the rest.

b. The Open Space Plan did not preclude reasonable industrial development on the property. By its terms it allowed the very intended use for which the property was purchased (nuclear power plant). The City Council stated it would entertain a development plan for industrial use of the property at the rezoning hearings. A general plan designation in California is tentative and cannot constitute a firm declaration of intent to condemn property for public use. *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 116.

San Diego as a charter city was not bound by state statutes to reject all development applications which were inconsistent with the Open Space Plan. California Government Code, Sections 65700, 65803. But even if it were, there is sufficient discretion in applying the term "consistency" that reasonable industrial use could be allowed. *Sierra Club v. County of Alameda,* 73 Cal.App.3d 572 (1977).

c. The other conduct of the City involved only reasonable planning efforts to acquire open space lands which are nonactionable. *Agins v. City of Tiburon,* ____ U.S. ____, 65 L.Ed.2d 106, 113, n. 9 (1980).

d. The conclusion that the only reasonable use of the property was industrial was based upon economic feasibility from an investment standpoint and witnesses ruled out many allowable uses simply because the general plan designated it industrial.

e. There was no actual public use of the property, no use existed and no applications for use were denied.

2. SDG&E May Not Seek Judicial Relief From The Application Of The Regulations Without Applying For Development.

SDG&E was required to apply for development in order that the specific application of the land use designations could be determined. *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 111. California law is in accord unless it can *positively* be said what the action will be in advance of application. *People v. Superior Court,* 91 Cal.App.3d 95, 104-105 (1979). To bypass this process denied City the opportunity to strike a reasonable balance between public and private interests.

SDG&E's witnesses' testimony was pure speculation and did not excuse it from making application for development.

3. Reasonable Land Use Regulations Are Valid Exercises Of The Police Power And Resulting Loss Of Value Is Noncompensable.

The police power is one of the least limitable and often cuts down property rights. *Queenside Hills Realty Co. v. Saxl,* 328 U.S. 80, 83 (1946). Land use regulations have been upheld notwithstanding

substantial diminution in value of property or denial of the most profitable use. *Hadacheck v. Sebastian,* 239 U.S. 394, 405 (1915); *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 592 (1962).

The regulations here serve recognized police power objectives. *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 112.

4. The Regulations Have Not Violated Constitutional Rights.

SDG&E's reasonable investment-backed expectations were not frustrated. A property owner has no vested rights in existing or anticipated zoning. *Hadacheck v. Sebastian, supra,* 239 U.S. 394, 410. SDG&E had no reasonable right to expect the zoning would remain unchanged on its property or that it could obtain necessary rezonings when it decided to carry out its plans years after purchase. SDG&E told City the rezoning would not affect its long-range plans, and it could not reasonably expect to substantially alter environmentally sensitive wetlands and a floodplain by placing three to four feet of fill on it in order to make the most profitable use. To condone such a contention would allow economics to dictate the use of economically marginal and environmentally sensitive lands rather than considerations for the general welfare (here, flood protection and wetlands preservation).

The important governmental interests involved here when balanced against SDG&E's desire to make the most profitable use of its land result in no unfairness to the property owner.

5. Even If The Regulations Were Overly Burdensome, The Appropriate Remedy Is Not Inverse Condemnation.

There is no precedent for requiring damages for an exercise of the police power where no physical invasion of property rights has occurred. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) was an equitable action and did not state that damages were an appropriate remedy. Use of the term "taking" is used by the courts in the due process sense, not

eminent domain. *Fred F. French Investment Co. v. City of New York,* 385 N.Y.S.2d 5, 8-10 (1976).

Cases relied on by appellant involve eminent domain, physical damage, contractual rights or instances where monies have been appropriated to carry out public projects by eminent domain.

Physical invasions are treated differently. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979).

The constitution does not compel a damage remedy. In a regulatory situation there is no "public use" such as is contemplated by the takings clause. The constitution is satisfied when the burdensome regulation is invalidated. If the public entity wishes to accomplish its purpose it must then pay compensation.

The California Supreme Court has left inverse condemnation available in certain circumstances and will compel the issuance of permits. Appellant's fears that equitable remedies are inadequate are unfounded. There is no justification for a punitive remedy for exercises of the police power which may stray over the permissible line.

To provide an inverse condemnation remedy would violate the separation of powers doctrine by giving the discretion of when to expend public funds for condemnation to the courts. It would also have a chilling effect upon legislative bodies in exercising their duty to deal with ever increasing land use problems due to the real threat of bankrupting the public entity as a result of an error in judgment which could not be determined in advance. Planning activities such as the Open Space Plan here would have to cease or be conducted in secret without public participation.

For these reasons the decision below should be affirmed.

ARGUMENT

I

THIS IS NOT A "TAKING" CASE

A. THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S CONCLUSION THAT REGULATORY ACTIONS AND CONDUCT BY THE CITY EFFECTED A DENIAL OF ALL PRACTICAL, BENEFICIAL USE OF APPELLANT'S PROPERTY

The trial court's findings of fact have in effect been rejected by the Court of Appeal. The decision appealed from states that SDG&E has made no application to develop its property but does not agree with the trial court that SDG&E was excused from doing so because it would have been futile. It also states that there are disputed fact issues as to an arbitrary exercise of the police power or application of the zoning and general plan which are not covered by the trial court.

Even if the trial court's findings were not repudiated, this Court will review findings where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the federal question. *Fiske v. Kansas,* 274 U.S. 380, 385-386 (1926); *Norris v. Alabama,* 294 U.S. 587, 589-590 (1934). The trial court's findings were intermingled with the legal conclusion of a "taking" here.

1. The Change In Zoning.

The rezoning affected only about 100 acres out of the total 228 acres of property. Of that 100 acres rezoned, only 38 acres was changed as relates to permitted uses under the zoning (from an industrial zone to an agricultural or holding zone). Of the remaining 60+ acres, about 13 acres was changed from a single family residential zone to agricultural or holding zone and about 50 acres was changed only in density of dwelling units allowed in an agricultural or holding zone. (See Appendices D and E.)

That this rezoning had little or no practical effect on SDG&E's property is demonstrated by the following:

a. SDG&E's intended use of the property (nuclear power plant) was not a permitted use under the zoning on the property when purchased;[54]

b. SDG&E's intended use, as well as other industrial uses not specifically permitted in the agricultural zones, were permitted by conditional use permit;[55]

c. The A-1 (agricultural) Zone may be applied as a "holding" zone, *i.e.*, to "undeveloped areas not yet ready for urbanization and awaiting development" as well as where agricultural uses may be reasonable;[56]

d. The 38 acres rezoned from M-1A to A-1-10 is in the area subject to tidal action where the lagoon or estuary is located and was not considered feasible for development and would not be developed in order to secure necessary permits according to SDG&E's witness;[57]

e. The rezoning of the 60+ acres merely changed the permitted density of dwelling units on property which SDG&E's witness testified was not suitable for residential purposes due to flooding and other considerations.[58]

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54 The closest use under the M-1A Zone (by incorporation of uses in the M-1 Zone) is "central electric plant" (see Appendix B herein). Arguably a non-nuclear power plant might fall within this use.

55 J.App. 149-150.

56 See Appendix C herein.

57 R.T. 102-105, 137; J.App. 105-106, 109, 112-113; Plaintiff's Exhibit 16 [R.T. 102, 106].

58 J.App. 104.

2. The Open Space Plan.

The testimony of SDG&E's witnesses and the finding of the trial court as to the effect of the Open Space Plan on the property were based upon the erroneous legal conclusion that state law required consistency of any development with the plan.[59]

Mr. Rick and Mr. Gallagher, SDG&E's engineer/planner and appraiser witnesses, concluded no use was permissible after adoption of the Open Space Plan unless consistent with open space, based upon *legal* advice as to the effect of that plan by SDG&E's attorneys.[60] Mr. De Vore, SDG&E Director of Governmental Affairs, testified that he understood the effect of the Open Space Plan was to constitute an open space overlay zone that took precedence over the underlying agricultural and industrial zoning on the property.[61] Mr. Worley, one of the attorneys whose opinion was relied on by the witnesses, testified it was his opinion that state law required denial of any development if not consistent with the Open Space Plan.[62]

That the Plan could not have the effect attributed by the witnesses is seen from the following:

a. The Nature Of A General Plan.

Under California law, a general plan is a statement of development policies, including diagrams and text, setting forth objectives, principles and proposals in order that it will serve as a pattern and guide for the

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59 Appellant also argues that City had a policy of requiring consistency. As will be shown, there is no evidence to support that conclusion nor was there any finding of fact to that effect by the trial court.

60 R.T. 141-144; J.App. 110-111, 122-123.

61 J.App. 76.

62 R.T. 95-96. Mr. Worley admitted he was attorney of record in a pending action against City in which the same contention was being made. R.T. 98.

orderly physical growth and development, and as a basis of efficient expenditure of local funds relating to the subjects of the plan and capital improvements.[63]

The general plan is not self-executing. To have meaningful effect it must be implemented through zoning ordinances, decisions with respect to zoning applications or expenditure of capital funds.[64]

San Diego's general plan map (Plaintiff's Exhibit 9) states in its legend:

> NOTE: This map represents General Plan land use and circulation policies and proposals in a generalized, graphic form. It is not a zoning map and should not be so construed.

SDG&E contends, and its witnesses' testimony was based on the premise that state legislation in 1973 effectively wiped out the distinction between planning and zoning in California by requiring all development to be consistent with the general plan.[65]

The California Supreme Court acknowledged the existence of the "consistency" legislation in *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 116, where the plaintiff there claimed the adoption of a general plan showing proposed public streets on its property amounted to a "taking" of its property, but nonetheless concluded:

> Neither *Klopping* nor any other decision of which we are aware holds that the enactment of a general plan for the future development of an area, indicating potential public

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63 Calif. Gov. Code §§ 65302, 65400; *O'Loane v. O'Rourke,* 231 Cal.App.2d 774 (1965); *The Local "General Plan" in Calif.,* 9 S.D.L.Rev. 1, 2 (1971).

64 *O'Loane v. O'Rourke, supra,* 231 Cal.App.2d 774, 780; 9 S.D.L.Rev., *supra,* 1, 22; 5 Pac.L.J. 55, 68 (1974).

65 SDG&E relies on Calif. Gov. Code §§ 65860, 65567 and 66474.

> uses of privately owned land, amounts to inverse condemnation of that land.
>
> . . . .
>
> . . . The adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property. . . . The county has not placed any obstacles in the path of plaintiff in the use of its land. Plaintiff has not been refused permission by the county to build on or subdivide its county land. . . . Furthermore, the plan is subject to alteration, modification or ultimate abandonment, so that there is no assurance that any public use will eventually be made of plaintiff's property.
>
> *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 119-120.[66]

b. The "Consistency" Requirements Were Not Applicable To San Diego

While state legislation requires all cities to adopt a general plan with certain mandatory elements (including an open space element [Calif. Gov. Code §§ 65302(e), 65700]), charter cities, such as San Diego, are expressly exempted from the consistency provisions (unless expressly adopted by charter or ordinance) by California Government Code Sections 65700 and 65803.[67]

The other statute which SDG&E relies on (Calif. Gov. Code § 66474) is found in the Subdivision Map Act and would apply only where a subdivision map is not consistent with the general plan.

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66 In accord: *HFH, Ltd. v. Superior Court,* 15 Cal.3d 508, 516 (1975), cert. den. 425 U.S. 904 (1976); *Pinheiro v. County of Marin, supra,* 60 Cal.App.3d 323, 328; *Dale v. City of Mountain View,* 55 Cal.App.3d 101, 108-109 (1976).

67 *Dale v. City of Mountain View, supra,* 55 Cal.App.3d 101, 108, n. 5.

SDG&E is incorrect in stating that any industrial use of its property would require a subdivision map. City's Planning Director testified in answer to a hypothetical question which assumed a type of industrial development prevalent to the southeast of the subject property that in that situation "we *probably* would require a subdivision map. . . ."[68] [Emphasis added.] He also stated that he believed a map would be required for division of the property.[69] The only other evidence is the testimony of Mr. Worley that, "I would also *presume* that a development of this magnitude would *likely* result in the requirement for . . . a subdivision map . . ."[70] [emphasis added] in response to a particular hypothetical industrial development.

Reference in the Open Space Plan to the State Map Act does not establish a policy of requiring consistency, let alone a policy which is mandatory upon City. In fact, the evidence was that the City Council did approve a substantial development in an area designated open space in the general plan.

c. Even If Consistency Were Required, Reasonable Use Could Be Made Of The Property.

There is no substantial evidence in the record to support a conclusion that there was no reasonable use of the property which could be consistent with the Open Space Plan, even assuming that the only feasible use of the property was for industrial purposes.

The Open Space Plan is flexible and subject to change. It was to be submitted to the state following adoption and was intended to serve as one of a series of background reports on various elements that were to

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68 J.App. 135-136.

69 J.App. 136.

70 J.App. 93.

comprise City's revised general plan.[71] It was to be comprehensively reviewed no less than every two years.[72]

The Plan discussed two major categories of open space: one which would be kept essentially free of structural improvements and generally designated for acquisition; the other being lands that can retain a high degree of utility as open space though some development may occur if sensitively planned.[73]

While SDG&E's land was proposed for acquisition by the Plan map there was nothing which precluded other approaches to preserving open space. Among the approaches discussed by the Plan was use of flood-plain zones.[74]

The Plan makes only generalized references to public acquisition, stating that acquisition must be carefully weighed in terms of limited financial resources available and other factors.[75]

Most importantly, the text of the Plan, referring to the subject property, states:

> . . . [SDG&E] has a large (240 acre) ownership which it intends to utilize as the location of a nuclear power plant sometime in the 1980's. Again, such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem.[76]

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71 J.App. 157.

72 Plaintiff's Exhibit 11, p. 40 [R.T. 36, 39].

73 Plaintiff's Exhibit 11, p. 12 [R.T. 36, 39].

74 Plaintiff's Exhibit 11, p. 8 [R.T. 36, 39].

75 Plaintiff's Exhibit 11, pp. 9, 35 [R.T. 36, 39].

76 J.App. 160.

The requirement of "consistency" is not sufficiently precise to be susceptible to a legal conclusion as to its application. The term "consistency with" in the context of development and the general plan is a relative one and depends upon a particular fact situation. In this regard, the California Attorney General has opined:

> . . . it is apparent that consistency between the subdivision map and the general plan does not require an exact identity, rather that the proposed tentative or final subdivision map be in agreement with or harmonious with the general or specific plan.
>
> Without being presented with a specific factual setting, it is difficult to state with any degree of certitude what sort of subdivision would be consistent or inconsistent with any particular general or specific plan.
>
> 59 Ops.Cal.Att'y Gen. 129, 131 (1976).

SDG&E misstates the evidence in stating that City's Planning Director testified that he did not know of an industrial use that would be consistent with open space. (Appellant's Brief, p. 14.) The pertinent part of the record is as follows:

> Q. Now, do you consider that any industrial development on this portion of the property indicated in brown on Plaintiff's 1 across the way would leave the property primarily in its natural state?
>
> A. I think there could be a design for industrial development on that property that would achieve essentially what's called for here, yes, sir. I haven't seen one, but I think that that's possible.
>
> Q. And do you think that that design would leave the property with value for park and recreation purposes?

> A. I think it could be either that or, as the definition indicates, complement the adjacent area for said purposes.[77]

Mr. Goff's testimony related to particular property. The reason he had not seen such a design is that none had ever been submitted.

Mr. Goff also testified that the City Planning Department reviews, makes recommendations to the Planning Commission and City Council on land use proposals but it would not be proper for the Planning Department to recommend against a development solely because of an open space designation.[78]

SDG&E's witnesses testified as though the Open Space Plan has totally superseded the general plan so that open space was the only use designated for the property by the general plan, but the resolution adopting the Plan merely recites the state requirement for it and adopts it without reference to the general plan.[79] Comparing this resolution with those adopting the Torrey Pines Community Plan and amending the general plan accordingly,[80] it is clear that no amendment of the general plan map was made by adopting the Open Space Plan.

The result is that where implementation of the Open Space Plan is infeasible, development may proceed in accordance with the general plan map designation and underlying zoning.[81]

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77 J.App. 143.

78 R.T. 338:2-8; J.App. 134; R.T. 359:22-26--360:1-25; J.App. 139-140.

79 J.S.App. K-10.

80 Defendant's Exhibits E and F [R.T. 346, 394]; R.T. 356:6-22. These resolutions specifically recite that the community plan is not effective until the general plan is amended and incorporates the plan into the general plan map.

81 This is consistent with the advice of the City Attorney's Office to the City Council at the hearing to adopt the Open Space Plan to the effect that the Plan would not "deep-freeze" the property--that if efforts to acquire properties were to fail the underlying zoning would control development. J.App. 135.

The case of *Sierra Club v. County of Alameda, supra,* 73 Cal.App.3d 572, supports the position that City could allow industrial or other development of the subject property consistent with open space.

In that case, permission to develop 145 acres out of 2,555 acres (about 6%) was granted for substantial recreational facilities and structures. A condition of the permit was that the balance of 2,410 acres shall be used only for a cattle ranch and trails, and otherwise remain undeveloped. The court held the permit was consistent with open space because it served some, although not all, of the goals of the open space element and required a commitment of 2,410 acres of land to a type of open space which would not otherwise have been possible except by the county payment therefor.

3. Other Conduct.

Other conduct by City consisted of planning activities to acquire open space and a direction by the City Council to staff to determine a schedule of open space areas which could be rezoned with agricultural, floodplain or L.C. zoning (a hillside review zone). These actions had no effect upon the use of the subject property either as a legal or physical constraint and there is no finding that they constituted unreasonable precondemnation conduct.

This Court has recently agreed with the California Supreme Court that good faith planning activities not resulting in an eminent domain proceeding are not a compensable interference with property rights. *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 113, n. 9.

4. Conclusion That Only Reasonable Use Was Industrial.

Appellant's witnesses ruled out some potential uses of the property due to economic infeasibility, ruled out others because not consistent with the general plan designation, and failed to consider uses permitted by conditional use permit such as: structures and uses by a public utility,

research, development and testing laboratories and facilities.[82] They did not consider any potential use as being reasonable if not economically feasible from an investment standpoint.[83]

Nor was the property valueless after the City's actions according to SDG&E's witness who testified that it had a "nominal" value of $1,000 per acre for the gross usable portion.[84]

5. The Decision Below Did Not Affirm The Trial Court's Findings.

The second Court of Appeal opinion (J.App. 63) did not affirm the trial court's findings nor does it address City's contention that there was no substantial evidence to support the findings. In fact, by stating that SDG&E had made no application or inquiry to City for use of the property it throws serious doubt on the finding that it would have been futile for such application.

B. THERE IS NO EVIDENCE THAT THE PROPERTY HAS BEEN DEVOTED TO PUBLIC USE

No actual public use has been made of or required on SDG&E's property as a result of City's actions. No existing use by SDG&E has been terminated or interfered with and no applications for use have been denied.

The property was unused and undeveloped when purchased by SDG&E and it remained in the same condition after the acts complained of.

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82 J.App. 103-105, 123-125, 149-150. The witnesses also ruled out some uses on spurious reasons, *e.g.*, motel use--property not as close to the beach as Mission Bay; recreational vehicle park--usually are only about 10 acres. J.App. 105.

83 J.App. 104-105, 110, 115, 123-126, 76, 81-82.

84 J.App. 126.

C. APPELLANT MAY NOT SEEK JUDICIAL RELIEF FROM THE APPLICATION OF THE LAND USE REGULATIONS WITHOUT APPLYING FOR DEVELOPMENT

This Court recently stated, "Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions." *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 111.[85]

The cases of *Sneed v. County of Riverside,* 218 Cal.App.2d 205 (1963) and *Furey v. City of Sacramento,* 24 Cal.3d 862 (1979), cited by SDG&E as excusing them from applying for relief from zoning restrictions, are distinguishable. *Sneed* involved actual use of the property for public purposes and an existing use was interfered with. *Furey* involved an open space ordinance which prevented any change from its zoning for a substantial period and an actual denial of one plaintiff's application for relief.

California courts have recognized an exception to the requirement to exhaust administrative remedies where "the aggrieved party can positively state what the administrative agency's decision in his particular case would be." *Ogo Associates v. City of Torrance,* 37 Cal.App.3d 830, 834 (1974).

Here, there was no substantial evidence to bring SDG&E under the exception. The trial court's finding on this point is based on two erroneous premises: (1) that City was compelled by state law to reject any development not consistent with open space; and (2) that there was no reasonable use consistent with open space, or City would reject any reasonable use as being inconsistent.

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[85] California is in accord: *Metcalf v. County of Los Angeles, supra,* 24 Cal.2d 267, 269; *Pan Pacific Properties, Inc. v. County of Santa Cruz,* 81 Cal.App.3d 244, 249-251 (1978); *People v. Superior Court, supra,* 91 Cal.App.3d 95, 104-105.

The legal point has been addressed above. The second premise is based on pure speculation.

Mr. De Vore testified he was unaware of any specific instance to support his opinion that City would deny an application for development.[86] Mr. Worley's testimony (admitted for the limited purpose of why SDG&E didn't apply for permits)[87] was that he would have advised a client of the futility of application based on two instances, one in which City allowed development notwithstanding an open space designation, and another in which City denied, but which he could not say was solely due to the open space designation.[88] Mr. Worley also said that the City Council "would most likely" interpret any use of the property consistent with its zoning as being inconsistent with open space, "especially if it didn't want the property developed."[89] Mr. Gallagher relied on SDG&E's attorney and Mr. Worley to support his opinion which was otherwise based on examples in other jurisdictions.[90]

SDG&E's argument that there is no administrative remedy for a constitutional violation presupposes that there is a violation, *i.e.*, that no reasonable use is allowed. Yet the purpose of the exhaustion of remedies doctrine is to determine if in fact there has been such a violation where there exists administrative or legislative discretion which may determine what use or development may be made. Here that discretion clearly

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86 J.App. 84.

87 The trial court sustained City's objection to this testimony offered for the purpose of proving what City Council might do on an application stating, ". . . he's endeavoring to infer an opinion from an opinion," but allowed it for the purpose stated. J.App. 90-91, 93.

88 Mr. Worley's example involved denial of a subdivision map. Since there are other valid reasons for denial of a map, a court will not presume it was solely due to an open space designation. *City of Walnut Creek v. Leadership Housing Systems,* 73 Cal.App.3d 611, 621 (1977).

89 J.App. 95.

90 J.App. 128-129.

existed by way of conditional use permits which would allow industrial development even in the agricultural zone and in interpreting what type of development plan might be consistent with open space.

The words of the court in *People v. Superior Court, supra,* 91 Cal.App.3d 95, 104, 105, are particularly relevant here:

> One compelling reason for requiring property owners to seek commission permits before raising inverse condemnation claims is that the commission should be put to the task of deciding specific cases. Its position should not be inferred from general comments of staff and from broad statements about priorities for acquisition.
>
> . . . Here, although property owners might have reason to expect that a one-year delay condition might be imposed upon their building and that the ultimate result might be state purchase, they had no good reason to anticipate outright denial of a permit. The bypassing of the administrative process denied the commission the opportunity to strike a reasonable balance between public and private interests. There is no room for a presumption that the commission will invariably sacrifice private interests to its concept of the public good.

Furthermore, an application for development of property may be the very impetus which causes an amendment to a general plan, assuming such was necessary, which, as noted in *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, is tentative and subject to change.

D. REASONABLE LAND USE REGULATIONS ARE VALID EXERCISES OF THE POLICE POWER AND ARE NOT COMPENSABLE DUE TO LOSS OF VALUE OF PROPERTY

This Court has long recognized that:

> . . . The police power is one of the least limitable of governmental powers and in its operation often cuts down property rights.
>
> *Queenside Hills Realty Co. v. Saxl, supra,* 328 U.S. 80, 83.

The Court has also recognized that mere diminution in market value of property due to enactment of zoning regulations does not give rise to constitutional taking or otherwise render the regulation invalid, notwithstanding a substantial reduction in value. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 384 (1926) (75% diminution); *Hadacheck v. Sebastian, supra,* 239 U.S. 394, 405 (93% diminution).

Nor has the fact that a regulation deprives property of its most beneficial or profitable use been held determinative of its validity or whether a "taking" has occurred. *Goldblatt v. Town of Hempstead, supra,* 369 U.S. 590, 592; *Andrus v. Allard,* 444 U.S. 51, 66 (1979).

Recently this Court has affirmed these principles, citing its many prior cases:

> . . . [I]n instances in which a state tribunal reasonably concluded that "the health, safety, morals or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized property interests.
>
> *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 125 (1978).

Appellant does not contend that the zoning or Open Space Plan do not serve legitimate police power objectives. This Court has recently agreed with the State of California's recognition that open space legislation serves legitimate governmental goals. *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 112. Such objectives as coastal resources protection (Calif. Pub. Res. Code § 3000 et seq.) and flood protection (*e.g.,* 42 U.S.C. 4102) are also unquestionably legitimate governmental goals.

E. THE REGULATIONS HAVE NOT VIOLATED CONSTITUTIONAL RIGHTS

1. Reasonable Investment-Backed Expectations.

It is well established that a property owner has no vested rights in existing or anticipated zoning, at least where no actual use of the property exists. *Hadacheck v. Sebastian, supra,* 239 U.S. 394, 410.

This Court has also stated:

> . . . the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.
>
> *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, 129.

And, ". . . loss of future profits . . . provides a slender reed upon which to rest a takings claim." *Andrus v. Allard, supra,* 444 U.S. 51, 62 L.Ed.2d 210, 223.

As stated by the California Supreme Court,

> The long settled state of zoning law renders the possibility of change in zoning clearly foreseeable to land

> speculators and other purchasers of property, who discount their estimate of its value by the probability of such changes.
>
> *HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, 521.

It follows, in view of the nature of a general plan as set forth above, that the same principle is true as to general plan designations for use of property.

SDG&E had no right to expect that the zoning of its property would remain unchanged until it was ready to make use of it, nor did it have a reasonable expectation that the portions zoned agricultural when purchased would be rezoned to industrial when it wanted them to be.

A considerable amount of time passed from SDG&E's purchase and the actions of which it complains. City could not have bargained away its right to exercise the police power for the common good simply because it sold 25 acres of the land to SDG&E. *Acker v. Baldwin,* 18 Cal.2d 341, 345 (1941).

Furthermore, SDG&E took the position at the rezoning hearings on its property that the proposed rezoning would not have any effect on its long range plans.[91] SDG&E's reasonable investment-backed expectation was that this property may be suitable for a potential nuclear power plant which complied with all governmental restrictions and conditions in effect at the time of construction.

If it had any expectation that the property could be developed for the type of intensive industrial development that it proposed at trial, such expectation simply was not reasonable.[92]

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91 J.App. 148.

92 To accomplish such a development entailed rezoning of portions zoned agricultural, placing 3 to 4 feet of fill material altering a natural floodplain and ecologically sensitive property, and obtaining necessary coastal permits. (*E.g.,*

(Footnote continued on page 35)

To condone such an expectation would be to allow economics to dictate land use planning and controls at the expense of reasonable regulation for the general welfare and safety.

While this Court has stated that impacts on economic and investment-backed expectations are relevant considerations in "taking" cases, the adoption of a test based on economic feasibility of development of property, while at first blush appealing, would be impractical and produce results such as the case at bench based on speculative testimony. Such a test is especially unreasonable where economically marginal lands, as here, are purchased on speculation for a unique purpose at high cost and subsequent market conditions and costs dictate what use is economically feasible notwithstanding the existing development regulations and physical nature of the property.

California courts have rejected such a test as being nothing more than a statement that the property suffered a loss in value. *Pinheiro v. County of Marin, supra,* 60 Cal.App.3d 323, 325.

The crux of SDG&E's frustrated expectations is disclosed by Mr. De Vore's testimony that, "It's always envisioned that the property will not, in any event, go down in value. . . ."[93]

2. Balancing Competing Interests.

The Open Space Plan and rezoning advance very important public interests, including public safety (landslides and flooding), preservation of endangered wildlife, as well as the enhancement of life and aesthetic considerations.

Footnote 92 continued

Calif. Pub. Res. Code § 27401(a) required a two-thirds vote to issue a permit for "dredging, filling, or otherwise altering any bay, estuary, salt marsh, river mouth, slough, or lagoon," and see § 27402.)

93 J.App. 69.

These interests are surely as important as a property owner being able to make the most profitable use of his property. The character of the governmental action is a relevant consideration and interference with property arising from a public program adjusting the benefits and burdens of economic life to promote the common good are less likely to run afoul of the constitution. *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, 124.

In light of the effect of the regulations here, the nature of the property, and the public purposes to be served, it cannot be said that SDG&E is bearing an unfair burden.

II

EVEN IF THE REGULATIONS WERE OVERLY BURDENSOME, THE APPROPRIATE REMEDY IS EQUITABLE RELIEF, NOT DAMAGES[94]

A. THERE IS NO PRECEDENT FOR HOLDING THAT THE CONSTITUTION COMPELS DAMAGES AS A REMEDY FOR AN EXERCISE OF THE POLICE POWER WHERE THERE HAS BEEN NO PHYSICAL INVASION OF PROPERTY RIGHTS

SDG&E relies on the oft-quoted passage from the case of *Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. 393, 415, that, ". . . while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," and the many subsequent cases which quote it.

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[94] Due to City's belief that the facts here are of crucial importance on the "taking" issue and its extensive discussion of that issue, the following discussion is somewhat cursory due to limits on the length of briefs. The issue is of great importance, and if the Court believes a "taking" has occurred, City directs the Court's attention to the more extensive treatment of this issue in amici's briefs; *e.g.,* National Trust For Historic Preservation and California Coastal Commission.

However, none of these cases, including *Pennsylvania Coal,* have actually held that a land use regulatory measure which is overly burdensome requires compensation or that such amounts to an exercise of the power of eminent domain entitling the owner to bring an inverse condemnation action.

The *Pennsylvania Coal* case was an equitable action where an injunction was sought by owners to prohibit the removal of subsurface coal based on a law restricting the removal. This Court refused to uphold the granting of an injunction because to uphold it would amount to a "taking" of the coal companies' property rights.

Pennsylvania Coal is distinguishable in that an existing use was being terminated and to enforce the law would have given the property owners rights which they had knowingly contracted away.

Although the Court used the term "taking" in *Pennsylvania Coal,* it is clear that it was used in a due process sense, not in the eminent domain context.

As was stated by the New York Court of Appeals:

> True, many cases have equated an invalid exercise of the regulating zoning power, perhaps only metaphorically, with a "taking" or a "confiscation" of property, terminology appropriate to the eminent domain power and the concomitant right to compensation when it is exercised. . . .
>
> The metaphor should not be confused with the reality. Close examination of the cases reveals that in none of them, anymore than in the *Pennsylvania Coal* case (*supra*), was there an actual "taking" under the eminent domain power, despite the use of the terms "taking" or "confiscatory". Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under

> the due process clause, and the cases were decided under that rubric.
>
> *Fred F. French Investment Co. v. City of New York, supra,* 385 N.Y.S.2d 5, 8-10, 350 N.E.2d 381, dism. 429 U.S. 990 (1976).[95]

Cases relied on by appellant and its amici involve actual eminent domain actions, physical damage to property, contractual rights, or instances where Congress authorized public improvement projects, appropriated monies and authorized the use of eminent domain to carry them out.[96]

The recent case of *Kaiser Aetna v. United States, supra,* 444 U.S. 164, is also distinguishable in that the navigational servitude there, if upheld, would result in an actual physical invasion of the property. Nor did this Court in that case compel the government to acquire an easement and to pay for it by reasoning that the attempted regulation had been transformed into an exercise of the eminent domain power.

Although the Court has stated that it does "not embrace the proposition that a 'taking' can never occur unless government has transferred

---

[95] Likewise, the California Supreme Court said, ". . . the term 'taking' was used solely to indicate the limit by which acknowledged social goals of land control could be achieved by regulation rather than by eminent domain." *Agins v. City of Tiburon, supra,* 24 Cal.3d 266, 274.

[96] *E.g., United States v. Clarke,* ___ U.S. ___, 100 S.Ct. 1127 (1980); *United States v. Lynch,* 188 U.S. 445 (1903) (physical damage); *Davis v. Newton Coal Co.,* 267 U.S. 292 (1925) (confiscation and use); *Ivanhoe Irrigation Dist. v. McCracken,* 357 U.S. 275 (1958); *Armstrong v. United States,* 364 U.S. 40 (1960) (contractual rights); *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893); *Olson v. United States,* 292 U.S. 246 (1934) (eminent domain); *Hurley v. Kincaid,* 285 U.S. 95 (1932); *Danforth v. United States,* 308 U.S. 271 (1939); *United States v. Dickinson,* 331 U.S. 745 (1947); *United States v. Gerloch Live Stock Co.,* 339 U.S. 725 (1950); *Dugan v. Rank,* 372 U.S. 609 (1963); *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974) (instances where monies were authorized to carry out projects).

physical control over a portion of a parcel" (*Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, 123, n. 25), it does not follow that some physical invasion or interference with existing uses is not necessary,[97] even assuming the Court was using the term "taking" in the eminent domain sense.

B. THE CONSTITUTION DOES NOT COMPEL A DAMAGE REMEDY

Appellant's argument that an exercise of the police power if overly burdensome becomes an exercise of the power of eminent domain fails to distinguish between two distinct governmental powers.

> Under the power of eminent domain property cannot be taken for public use without just compensation. However, under the police power property is not taken for use by the public; its use by private persons is regulated or prohibited where necessary for the public welfare.
>
> *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.,* 11 Cal.App.3d 557, 571 (1970).

As stated in *Mugler v. Kansas,* 123 U.S. 623, 669 (1887), "In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."

The Fifth Amendment provides in relevant part:

> No person shall . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private

---

97 The Court has emphasized that instances of physical invasion are different from regulations which merely diminish value of property. *Kaiser Aetna v. United States, supra,* 444 U.S. 164, 180; *Andrus v. Allard, supra,* 444 U.S. 51, 62 L.Ed.2d 210, 222; *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, 124.

> property be taken *for public use*, without just compensation. [Emphasis added.]

In the regulatory situation we have here, there is no "public use" such as is contemplated by the takings clause. Also, to argue that mere legislation which is overly burdensome comes within the takings clause ignores the due process clause of the Fifth Amendment.

The California Supreme Court has discussed this concept of public use stating:

> . . . The doctrine of inverse condemnation rests upon the theory that after property has been devoted to a public use by a defendant so that it would seriously interfere with the service furnished by the defendant to the public if such use is discontinued public policy dictates that such use should not be discontinued and the property owner's only relief in such a situation is an action for the value of the property taken and the damages to his remaining property by way of inverse condemnation. (Citations omitted.) To make this doctrine applicable, however, the property must in fact have been devoted to a public use by the defendant to the extent that the public interest would suffer by the discontinuance of such use. "The doctrine of inverse condemnation . . . can be properly applied only where a public use has attached."
>
> *Cothran v. San Jose Water Works,* 58 Cal.2d 608, 614 (1962).

The constitution is satisfied when the overly burdensome legislation is invalidated.[98]

---

[98] Many state courts are in agreement with the California courts: *Eck v. City of Bismark,* N.D., 283 N.W.2d 193 (1979); *Gary D. Reihart, Inc. v. Township of Carroll,* Pa., 409 A.2d 1167 (1979); *Holaway v. City of Pipestone,* Minn., 269 N.W.2d 28 (1978); *Davis v. Pima County,* 121 Ariz. 343, 590 P.2d 459 (1978); *Fred F. French Investment Co. v. City of New York, supra,* 385

(Footnote continued on page 41)

C. PUBLIC POLICY DICTATES THAT NO INVERSE CONDEMNATION REMEDY BE RECOGNIZED HERE

1. Adequacy Of Equitable Remedies.

Appellant and its amici argue that the California Supreme Court has totally abolished the remedy of inverse condemnation or money damages in land use regulation cases leaving woefully inadequate equitable remedies. Yet that court left intact the right to recover for decline in market value of property resulting from unreasonable delay or conduct prior to condemnation,[99] and has upheld inverse condemnation where access has been denied to property.[100] There remains a statutory remedy for inverse condemnation where eminent domain proceedings are not brought within six months of adopting a resolution of necessity to condemn.[101]

The California courts also retain the right to compel the issuance of a permit[102] or to preclude the application of regulations.[103]

It is argued that the California courts are reluctant to invalidate regulations; thus it is not an adequate remedy. In light of the authorities set forth above, it is not surprising that the courts do not readily invalidate

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Footnote 98 continued

N.Y.S.2d 5, 350 N.E.2d 381; *Mountain Medical, Inc. v. City of Colo. Springs,* Colo. App., 608 P.2d 821 (1980); *Mailman Development Corp. v. City of Hollywood,* Fla. App., 286 So.2d 614 (1973).

99 *Agins v. City of Tiburon, supra,* 24 Cal.3d 266, 278.

100 *Jones v. People ex rel Dept. of Transp.,* 22 Cal.3d 144, 152 (1978).

101 California Code of Civil Procedure, Section 1245.260.

102 *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 123.

103 *Furey v. City of Sacramento, supra,* 24 Cal.3d 862, 877-888.

these regulations. They may not be set aside merely because of hardship or denial of the most profitable use of one's property. The implication of this argument is that the courts would be more willing to impose damages. In essence, appellant argues that a landowner's financial losses due to proper exercises of the police power ought to be compensated for. This is, of course, directly contrary to the many holdings of this Court.

Appellant's amici also argue that invalidation is inadequate because the public entity will continue to frustrate the landowner by enacting new laws that serve to frustrate development. Implicit in such arguments is the belief that legislative bodies have ulterior motives in adopting land use regulations. This is borne out by amici's argument that damages are necessary as a remedy to serve as a deterrent.

This is certainly not a common practice by public entities, and where it does occur the courts in California have ample remedies to deal with it, including damages, as pointed out above.

In citing *Owen v. City of Independence,* ____ U.S. ____, 63 L.Ed.2d 673 (1980), appellant draws upon tort law (*ibid,* at 684). Such theory should not apply to legislative actions, as here, where no actual interference of rights has occurred. As the California Supreme Court recognized citing this Court, "of course, it is not a tort for Government to govern. . . ."[104]

Furthermore, the California Supreme Court at least implied that "direct and special interference" with a property owner's rights other than a denial of access may justify an inverse condemnation action.[105]

---

104 *HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, 519; *Dalehite v. United States,* 346 U.S. 5, 57 (1952) (Jackson, J. dissenting).

105 *Jones v. People ex rel Dept. of Transp., supra,* 22 Cal.3d 144, 152.

2. Separation Of Powers.

To provide a remedy in inverse condemnation would permit the landowner to elect to sell his property and the courts to enforce such sale to a public entity regardless of whether the elected officers felt the expenditure was prudent or funds available. Thus the courts would be substituting their judgment for that of the legislative body in violation of the doctrine of separation of powers. *Village of Euclid v. Ambler Realty Co., supra,* 272 U.S. 365, 388.

In attempting to exercise the police power to regulate land use, the Legislature certainly is not determining to purchase the property to achieve its ends. That decision should be left to the governing body and will be where the courts determine the regulation cannot be upheld as a police power measure.

3. Chilling Effect Upon The Exercise Of Governmental Powers.

The ill-effects of urbanization and the increasing necessity to preserve our natural resources are important matters recognized by the courts as being proper subjects of land use regulations.[106]

In order to deal with these increasing problems effectively, public entities must have the flexibility to utilize new and untested approaches in land use planning.

Appellant's amici argue that governments must be responsible for their land use actions. Implicit in their argument is that public entities know in advance the exact effect of their land use actions on the properties affected. Such an assumption is unwarranted.

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106 *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 112; *Agins v. City of Tiburon, supra,* 24 Cal.3d 266, 275.

The public entity does not have the resources to predict with any degree of certainty the effect on specific parcels of property especially when in the arena of economic feasibility of use. Such results are often dictated by the landowner, *e.g.*, the purchase price of the property or the intended use of it. Or, they may be determined by changing and uncontrolled factors such as market and cost factors.

To make the legislative bodies subject to these variables and often unpredictable impacts at the risk of having to purchase the properties for errors in judgment would have the practical effect of divesting the legislative body of its responsibilities of representing the common interest.

Such a possibility which could result in financial havoc with any municipal budget would certainly have an inhibiting effect.

Here, where the primary action affecting SDG&E's land was a planning designation for open space, the warning by the California Supreme Court is particularly relevant:

> If a governmental entity . . . were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations. . . .
>
> *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 120.

The ultimate effect would be to cut out the public as a participant in land use planning for fear that planning in public may result in a forced purchase of property.

The California Supreme Court also rightly questioned the effect on the use of the initiative power to regulate land use which is responsible for major legislation in California. Are the voters to have the power to inadvertently or perhaps intentionally commit public funds?

Another aspect of allowing inverse condemnation is that in states such as California where the power of eminent domain may only be used for purposes authorized by statute,[107] the statute may be subverted.

Nor should this Court be willing to require public entities to pay for exercises of the police power which protect the public safety against flood hazards. If a landowner may assert such a taking claim because he may not substantially alter property in order to make intensive development in the valley reaches of three river systems of a floodplain, then government will either have to buy all floodplains or leave them unregulated at the risk of public safety and later public expense for disaster relief.[108]

CONCLUSION

For the reasons stated, there has been no denial of all reasonable use of appellant's property. Appellant's claim is based on speculation and misinterpretation of law. The California Supreme Court was correct in its conclusion and reasoning in *Agins v. City of Tiburon, supra,* and the decision below is correct in refusing to grant appellant relief. In fact, this Court is justified in dismissing the case on jurisdictional grounds. Alternatively, the decision below should be affirmed.

Dated: October 3, 1980

Respectfully submitted,

JOHN W. WITT, City Attorney

By: C. ALAN SUMPTION, Deputy

Attorneys for Appellee

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107 *City & County of San Francisco v. Ross,* 44 Cal.2d 52, 55 (1955).

108 See Sax, *Takings, Private Property & Public Rights,* 81 Yale L.J. 149 (1971).

APPENDICES

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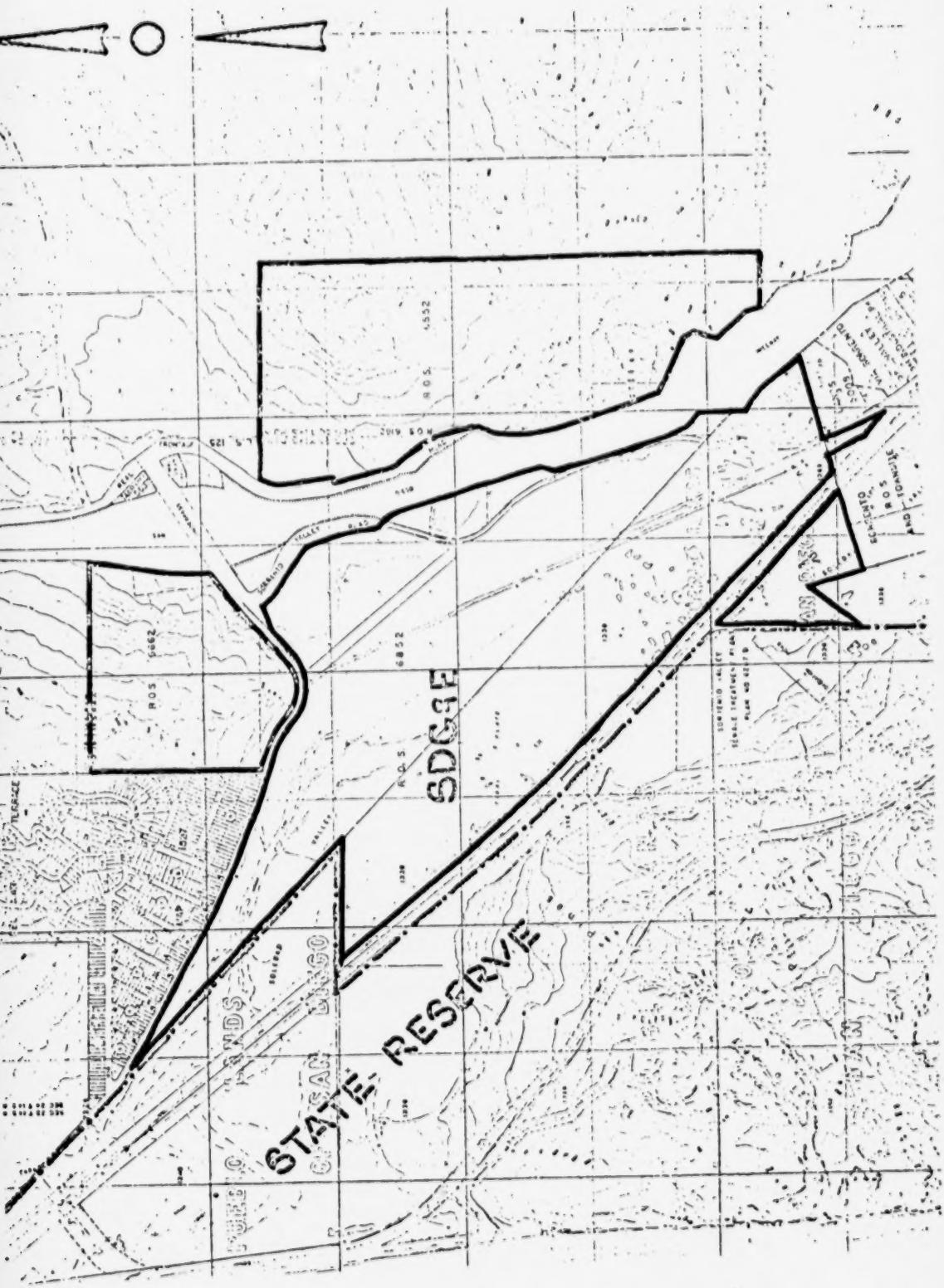


Excerpts From City Of San Diego Ordinance No. 9408 (New Series) Adopted April 21, 1966, And From Ordinance Nos. 9407 (New Series) And 9382 (New Series) Incorporated Into Ordinance No. 9408 (New Series)

SEC. 101.0436 M-1A ZONE Ordinance No. 9408 (New Series)

In the M-1A Zone, no building or premises shall be erected, constructed, converted, established, altered, and/or enlarged or used except for one or more of the uses permitted in the M-1 Zone under conditions and requirements set forth in Section 101.0437; provided, however:

(1) The following uses shall be prohibited:

(a) Churches;

(b) Dwellings, whether single-family or multiple-family, including house trailers, except one dwelling on the same lot or parcel of land which is legally being used so as to require the continuous supervision of a caretaker or superintendent and his immediate family;

(c) Hospitals, except for emergency hospitals incident to uses permitted in this zone;

(d) Hotels, motels, rooming houses, boarding houses and all other similar uses offering lodging to guests;

(e) Institutions or homes for the treatment or care of convalescent persons, children, aged persons, alcoholics, the wounded or mentally infirm;

(f) Schools, public and private, except for trade schools instructing in subjects incidental to a permitted use;

(g) Trailer parks;

(h) All signs not directly relating to the particular use of the property on which they are located;

SEC. 101.0437 M-1 ZONE Ordinance No. 9407 (New Series)

In an M-1 Zone, no building or premises shall be erected, constructed, converted, established, altered and/or enlarged or used except for one or more of the following uses:

1. Any use permitted in Zones R-1, R-2, R-4 and C.
2. Aeroplane manufacture.
3. Boat and canoe building.
4. Building materials storage.
5. Bottling works.
6. Bakery.
7. Blacksmith shop.
8. Cabinet making or carpenter shop.
9. Carting, express, storage yard.
10. Carpet or bag cleaning.
11. Central electric plant.
12. Cleaning and dyeing works.
13. Contractor's plant or storage yard.
14. Concrete pipe storage.
15. Creamery.
16. Ice cream manufacture.
17. Ice manufacture (less than 20 tons).
18. Impound storage yard.
19. Lumber yard.

20. Laundry.

21. Machine shop.

22. Metal working shop.

23. Milk distributing station.

24. Novelty or toy manufacture.

25. Outdoor advertising plant.

26. Potato chip manufacture.

27. Paper or pulp manufacture.

28. Saw planing, woodworking mill.

29. Stone dressing or cutting.

30. Storage warehouse.

SEC. 101.0433 C ZONE Ordinance No. 9382 (New Series)

In a C Zone, no building or premises shall be erected, constructed, converted, established, altererd and/or enlarged or used except for one or more of the following uses:

(1) Any use permitted in Zones R-1, R-2, R-4 or RC;

(2) Amusement place located entirely within a building, or golf practice range;

(3) Armory;

(4) Assembly hall;

(5) Athletic park;

(6) Auto paint and repair shop;

(7) Automobile, automobile trailer (usable), retail sales yard; or parking lot or garage;

(8) Bank, office or studio;

(9) Barber shop;

(10) Bath house;

(11) Billboard or advertising structure;

(12) Cleaning and dyeing works (not more than ten employees);

(13) Dancing academy;

(14) Funeral parlor;

(15) Furniture storage (provided all loading off street);

(16) Retail gasoline and fuel oil station;

(17) Hotel;

(18) Ice delivery station;

(19) Laundry (not more than ten employees);

(20) Machine shop (limited to 10 H.P. electric operated);

(21) Needle and millinery craft;

(22) Newspaper and job printing;

(23) Nursery and pottery retail sales yard;

(24) Photograph gallery;

(25) Plumbing shop;

(26) Public garage;

(27) Retaurant;

(28) Schools (trade or vocational);

(29) Store, retail;

(30) Store, for the conduct of a wholesale business where not more than 25% of the total floor area of building is used for storage, packaging of goods, wares, or merchandise and/or not more than 25% of the open area of the premises may be used for storage, provided, however, that all open storage spaces or areas shall be enclosed by a six (6) foot solid enclosure wall;

(31) Shoe repair shop;

(32) Shop for custom work on wearing apparel, fabrics, upholstery, window drapes and curtaining;

(33) Theater;

(34) Manufacturing and processing incidental to any of the above uses conducted on the premises and where the total power of all equipment does not exceed 10 H.P. and that not more than 15% of total floor area of building may be used for manufacturing.

Excerpts From City Of San Diego Ordinance
No. 8706 (New Series) Adopted August 16, 1962

SEC. 101.0404 A-1 ZONES - AGRICULTURAL

A. PURPOSE AND INTENT

The purpose of adopting this section of the San Diego Municipal Code and creating permanent A-1 (Agricultural) Zones is to provide appropriate zoning, with well-defined uses, of areas, which are rural in character, and presently may be zoned for agricultural purpose, only on an interim basis; it is the intention of the City Council that the A1-1, A1-5, A1-10 Zones be applied to undeveloped areas not yet ready for urbanization and awaiting development, those areas where agricultural usage may be reasonably expected to persist or areas designated as open space in the general plan.

B. PERMITTED USES

In a zone designated by the symbol "A1", followed by a number, the number shall determine in acres the minimum area of a lot in that zone, and on which no building or improvement, or portion thereof, shall be erected, constructed, converted, established, altered or enlarged, nor shall any premises be used except for one or more of the following purposes:

1. Single-family dwellings
2. Churches
3. Private stable
4. All agricultural uses, except the maintaining, raising, feeding or keeping of swine; provided that any dairy or the maintaining, raising, feeding, or keeping of ten (10) or more domestic animals (as defined in Municipal Code Section 44.0318) is located on premises containing five (5) or more acres.
5. Public utility substations
6. Killing and dressing of poultry, fowl, or rabbits raised on the premises, provided that any building so used shall be not less than fifty (50) feet from any property line.

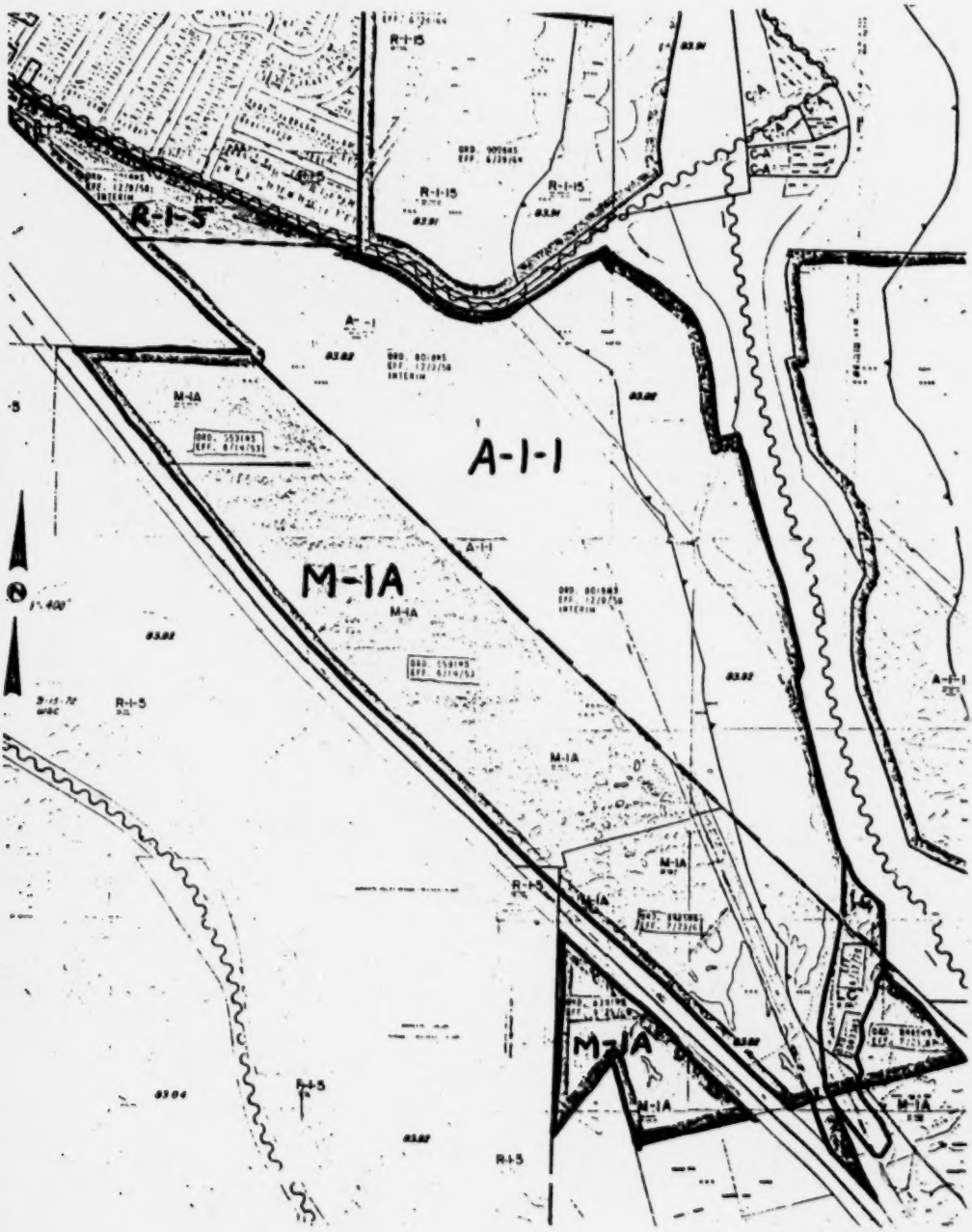
7. Commercial riding, training, or boarding horse stable, provided that such stable shall be located on a lot containing not less than five (5) acres.

8. Harvesting, processing, or selling of crops produced on the same premises.

9. One stand exclusively of wood frame construction (except the floor), and not exceeding 300 square feet in gross floor area, for the display and sale of agricultural crops produced on the same premises.

10. Accessory buildings and uses customarily incidental to any of the above uses, . . .

D-1



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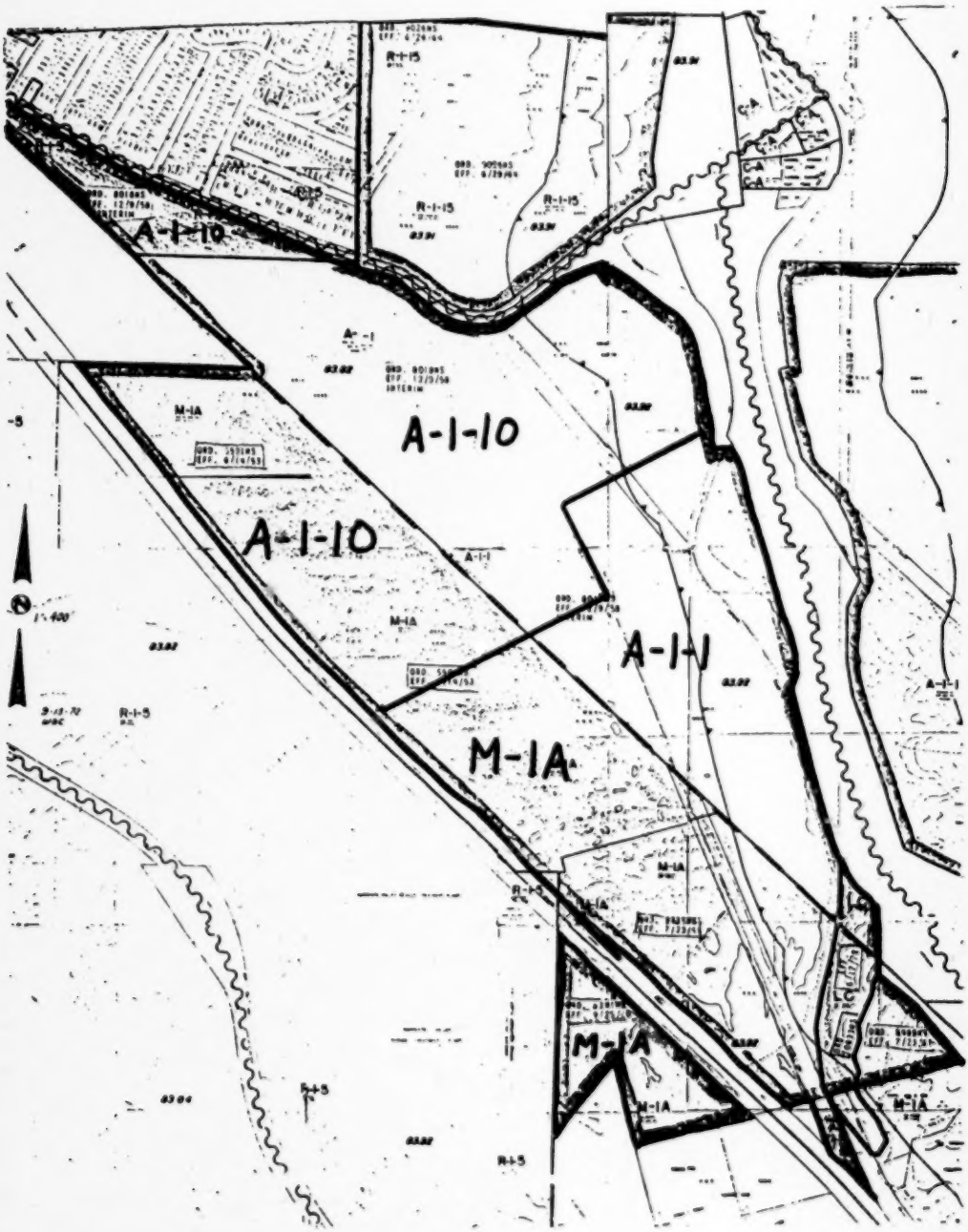
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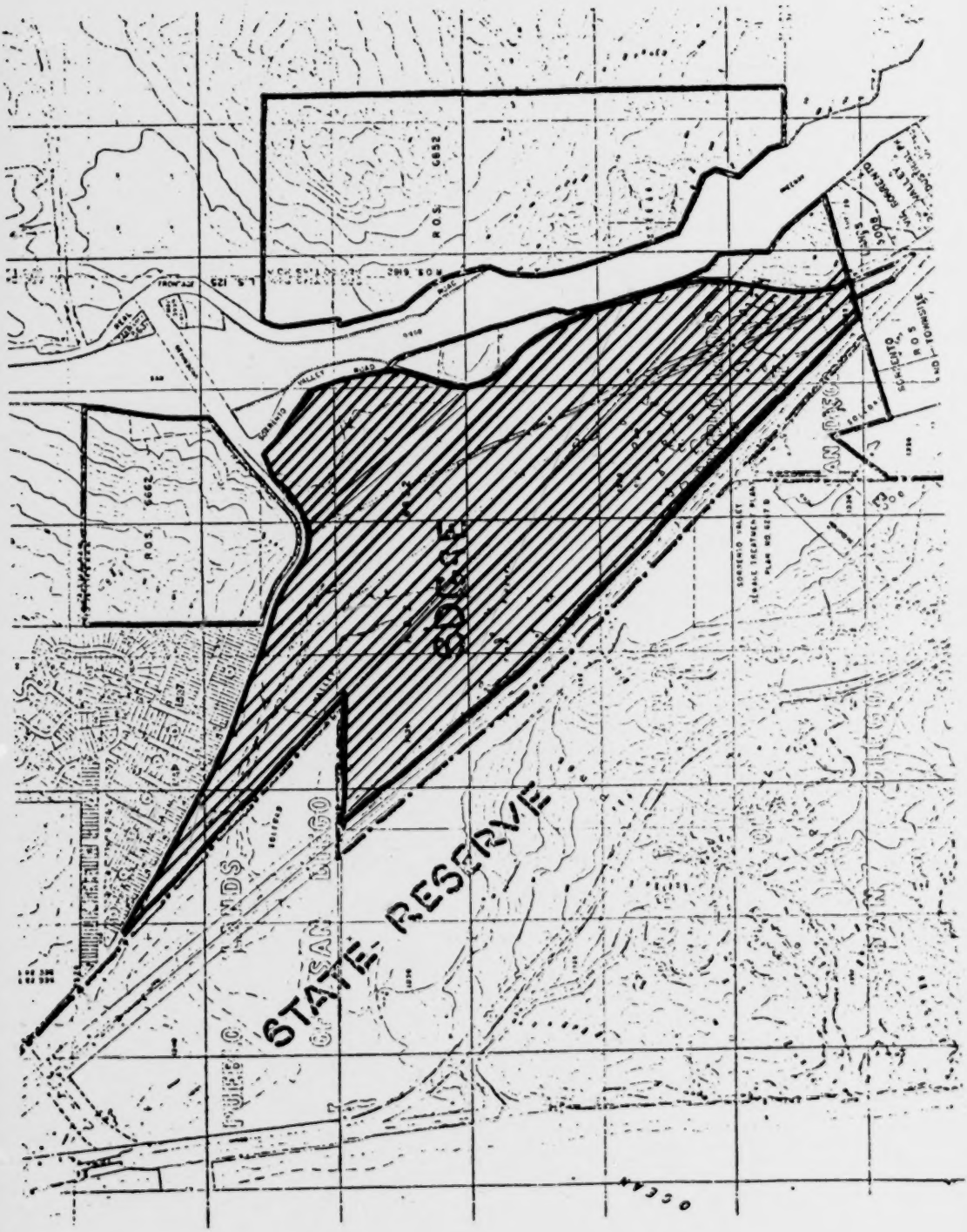

Excerpt From City Of San Diego Charter Section 90

SECTION 90. CONTRACTING BONDED INDEBTEDNESS.

(a) Whenever the Council shall determine that the public interest or necessity demands the acquisition, construction or completion of any municipal improvement authorized to be acquired, constructed, completed or maintained by The City of San Diego, the cost of which will be too great to be paid out of the ordinary annual income and revenue of said City, the Council may contract bonded indebtedness for said purposes or any of them, pledging the credit of the City or the property or revenue of any public utility owned by the City and the proceedings taken for incurring such indebtedness shall be in accordance with the mode and manner prescribed by the provisions of the general laws of the State of California relative to incurring bonded indebtedness by municipalities in force at the time such proceedings are taken. Every ordinance or resolution determining that the public interest or necessity demands such improvement shall be adopted only by a vote of five members of the Council and it shall require a vote of two-thirds of the electors voting on each proposition at a regular or special election for the issuance of such bonds before said indebtedness or liability for said improvements may be incurred, except ordinances authorizing such bond issues as are specified in Section 92 of this Article. . . .

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-678

IN THE

Supreme Court of the United States

October Term, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The California Court Of Appeal,
Fourth Appellate District, Division One

REPLY BRIEF

Ruth R. Mijuskovic
Luce, Forward, Hamilton & Scripps
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California 92101
Telephone: (714) 236-1414

Of Counsel

Louis E. Goebel
Goebel and Monaghan
Security Pacific Plaza
1200 Third Avenue, Suite 1700
San Diego, California 92101
Telephone: (714) 231-0059

Gordon Pearce
General Counsel
Guenter S. Cohn
Assistant General Counsel
San Diego Gas & Electric Company
101 Ash Street
San Diego, California 92101
Telephone: (714) 235-7822

Counsel for Appellant

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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I.

INTRODUCTION

Appellant, San Diego Gas & Electric Company (hereinafter "property owner") respectfully submits the following reply brief in partial response to the brief of Appellee, City of San Diego (hereinafter "City"), and numerous *amici curiae* briefs in support of Appellee filed concurrently. With a total of more than 80 pages of briefs by the parties and 13 *amici curiae* briefs on file already, property owner will resist the temptation to respond at length and be mercifully brief.

It is, however, essential to refocus the issues of *this case* after the concerted efforts by *amici curiae* in support of Appellee to transform the case into one of their own wishing by wholly unwarranted and pernicious attempts to "supplement" the record after the fact, raise new defenses never before raised by the parties, and inject spurious issues.[1]

Despite the fact that the Court's decision in this case may have profound precedential effect, the case is still before this Court on the record made in the court below and should be so determined.

---

[1] See particularly (or more precisely *disregard* particularly) the *Amici Curiae Brief of California Coastal Commission*, et al., and *Brief of Conservation Foundation*, et al., as *amici curiae* in support of Appellees and their highly improper inclusion of photographs, charts, and purported facts not in the record or not even in existence at the time of trial. Such references are not only in blatant disregard of Court rules (Rules 34.6 and 36.5) but are also erroneous and misleading in many respects. It would be fundamentally unfair to require or expect Appellant to respond to such extraneous matters and Appellant will not dignify those desperate attempts to modify the record at this late date with a response. Rather it is requested that this Court disregard and strike said briefs pursuant to Rule 34.6.

When viewed in this light, the central issue emerges clearly:

- Property owner established a federal constitutional "taking" to the satisfaction of the trial court.

- Property owner established a federal constitutional "taking" to the satisfaction of the California Court of Appeal.

- The California Supreme Court with its *Agins* decision purported to establish a state immunity against damages for federal constitutional takings in the area of land use regulation.

- The California Court of Appeal repudiated its prior finding of a federal constitutional "taking" *solely* on the basis of the purported state immunity promulgated by the California Supreme Court.

Thus, the central issue is:

> "Will this Court permit a state created immunity to bar redress of a violation of the federal constitution in the taking of private property without just compensation under the guise of the police power?"

A trilogy of recent cases from this Court --

> *Owen v. City of Independence,*
> ____ U.S. ____, 100 S.Ct. 1398 (1980)
>
> *Martinez v. State of California,*
> ____ U.S. ____, 100 S.Ct. 553 (1980)
>
> *Kaiser-Aetna v. United States,*
> 444 U.S. 164 (1979)

would seem to indicate that the answer is a resounding "*no*"!

II.

THIS IS A "TAKING" CASE -- THE COURTS BELOW *TWICE* SO FOUND

A. The Trial Court Found A Federal Constitutional "*Taking*".

Appellee City asserts that this is not a "taking" case. Not so! The trial court after a lengthy trial and on a fully developed record found a federal constitutional taking:

> "The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has further suffered severance damage with respect to the balance of the subject property."
> Finding of Fact No. 29.

> "The actions of defendant City against plaintiff's property were motivated to achieve a public purpose, namely, preservation of open space, without payment of just compensation and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, *constitute a taking* of the portion of plaintiff's property designated as open space *without due process of law and just compensation within the meaning of the California and United States constitutions*, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property."
> Conclusion of Law No. 1 (emphasis added).

> Joint Appendix, 41-43.

B. The "Taking" Was Based Not On A Single Act Or Regulation But Upon The Overall Impact Of A Course Of Conduct By The City.

Appellee City persists in trying to isolate and segregate individual aspects of the City's conduct and justify each separate category -- but the impact was not so realized. The conduct was cumulative and continuing. City ignores the synergistic effect of the various aspects of the City's conduct:

- Rezoning to very limited use property formerly designated for industrial use.

  [Finding of Fact No. 22, Joint Appendix 40]

- Violation of procedural due process in failing to give adequate notice of change in proposal.

  [Finding of Fact No. 20, Joint Appendix 40]

- Designation as open space lands which only two weeks earlier had been zoned industrial.

  [Findings of Fact Nos. 22, 23, Joint Appendix 40-41]

- Employment of a consistency policy which deprived property owner of all practical, beneficial or economic use of the property.

  [Finding of Fact No. 30, Joint Appendix 42]

- Taking formal action to condemn the property for public use and later abandoning formal action when desired result achieved without formal action.

  [Finding of Fact No. 16, Joint Appendix 38; Finding of Fact No. 26, Joint Appendix 41]

- Rendering the property unmarketable.

  [Finding of Fact No. 33, Joint Appendix 42]

- Causing the property to be devoted to use by the public as open space without payment of just compensation.

  [Finding of Fact No. 31, Joint Appendix 42]

As was found by the trial court, it was the actions of the City "*taken as a whole*," which constitute a "*taking*", "without due process of law and just compensation within the meaning of the California and United States constitutions." Conclusion of Law No. 1, Joint Appendix 42-43.

C. The California Court Of Appeal Found A Federal Constitutional "*Taking*".

The California Court of Appeal, in its initial opinion, expressly affirmed the finding of a federal constitutional taking. The court stated:

> "City challenges the support for and validity of Conclusion of Law #1 which states:
>
> '1. The actions of defendant City . . . taken as a whole, *constitute a taking* . . . of plaintiff's property . . . without due process of law and just compensation *within the meaning* of the California and *United States constitutions*, . . .'
>
> . . . .
>
> [There] is substantial evidence to support the trial court's conclusion."
>
> Joint Appendix 60-61 (emphasis added).

D. The California Court Of Appeal's Determination Of A "Taking" Was Based Upon The Overall Impact Of A Course Of Conduct -- Not A Single Act Or Regulation.

Like the trial court, the California Court of Appeal in its initial opinion based its finding of a federal constitutional taking upon the impact of a course of conduct -- not a single act or regulation:

> ". . . it was not the rezoning in itself which resulted in the taking. Rather, [property owner] owns land which because of its peculiar geographic situation and topography has a very limited number of uses. It is the *combination* of this and other factors, such as zoning, general plan, the 'consistency' policy, and the resolution to acquire property which led to the condemnation."
> Joint Appendix 59 (emphasis added).

Likewise, in regard to the synergistic impact of the various actions, the California Court of Appeal stated:

> "There is no evidence of actual physical invasion of the property. However, this is exactly what the City was trying to do by acquiring the property, that is, keep it from being used . . . The objective here is to have the property remain unused, undisturbed and in its natural state so open space and scenic vistas may be preserved. In this sense the property is being 'used' by the public as it has been ever since the date when all of the factors coalesced to effect the taking."
> Joint Appendix 60.

III.

THE FINDING OF A "TAKING" WAS REVERSED AND THE MONEY JUDGMENT NULLIFIED *ONLY* AFTER THE *AGINS* DECISION PURPORTEDLY CREATED A STATE IMMUNITY AGAINST MONEY DAMAGE CLAIMS

The finding of a federal constitutional taking was repudiated only after the promulgation by the California Supreme Court of the *Agins* decision and its purported state immunity against money damage claims. The terse second opinion of the California Court of Appeal will admit no other interpretation.

There, the court stated:

> "After our original affirmance, the California Supreme Court granted a petition for hearing. The case has now been retransferred to us for reconsideration in light of *Agins v. City of Tiburon,* 23 Cal.3d 605.
>
> A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; . . .
>
> The judgment is reversed."
>
> Joint Appendix 63, 66.

The result is inescapable. The same panel of appellate court justices who had previously found a federal constitutional taking, on the same record now found no taking and no right to compensation. Why? Because they had been told by the highest state court that

> "A LOCAL ENTITY'S ARBITRARY UNCONSTITUTIONAL EXERCISE OF THE POLICY POWER

WHICH DEPRIVES THE OWNER OF THE BENEFICIAL USE OF HIS LAND DOES NOT REQUIRE COMPENSATION; . . ."

Joint Appendix 66 (emphasis added).

There is no adequate state ground -- no want of a substantial federal question. The California Court of Appeal was told by the highest state court that no compensation was required for the arbitrary unconstitutional taking of private property, and the court acted accordingly. It is the interposition of this purported unqualified state created immunity as a bar to federal constitutional rights that Appellant property owner challenges.

IV.

THE PURPORTED STATE IMMUNITY CANNOT STAND IN THE WAY OF VINDICATION OF FEDERAL CONSTITUTIONAL RIGHTS

By any one of several rationales, the federal claims were properly before the California state courts and the California state courts accepted jurisdiction. See, *Martinez v. State of California*, ____ U.S. ____, 100 S.Ct. 553, 558 n. 7 (1980). Litigation of the federal claims is supported either (a) as a federal inverse condemnation cause of action; (b) as a federal constitutional tort cause of action under the rationale of *Bivens v. Six Unknown Narcotics Agents,* 403 U.S. 388 (1971); or (c) as a form of federal civil rights action under 42 U.S.C. § 1983 (see, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979)).

Under similar circumstances just last term, this Court declared that state immunity devices cannot control a federal claim being litigated in state courts. That case involved a state statute, but state common law

should fare no better. As the Court so eloquently stated in *Martinez v. State of California, supra*, at 558 n. 8:

> "A construction of a federal statute [or presumably a federal cause of action] which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced."

Neither the Fifth Amendment, the federal inverse condemnation cause of action, the *Bivens*-type federal constitutional tort, nor 42 U.S.C. § 1983, would have meaning if states could interpose their own concepts of immunity. As was stated in *Martinez*, the immunity claim raises a question of federal law. 100 S.Ct. 558 n. 8.

V.

THE "HARMFUL USE" DEFENSE IS A SPURIOUS AFTERTHOUGHT -- NEVER LITIGATED BELOW AND REFUTED BY THE FACTS IN THE RECORD

Various *amici* on behalf of Appellee City argue that City's actions were aimed at controlling a "harmful use" and are thereby immune from constitutional constraints. That position was not asserted by the City below -- and for good reason! City had acknowledged repeatedly that development of substantial portions of the property would not be a "harmful use." Almost all of the property was designated for industrial use in the City's 1967 General Plan. That designation was reaffirmed repeatedly through 1972. (Finding of Fact No. 7, Joint Appendix 37). Until June of 1973, a substantial portion of the property was zoned for industrial use. Even after June of 1973, a portion of the property was zoned for industrial use. (Finding of Fact No. 22, Joint Appendix 40).

The trial court found that the highest and best use of the property was for an industrial park and related buffer areas. (Finding of Fact No. 27, Joint Appendix 41.)

An expert planning witness testified that "it would be a prudent and certainly normal development decision to construct an industrial park in a flood plain of this nature," and referred to other similar experiences in Mission Valley, another flood plain area in San Diego, which is developed with commercial uses. (Joint Appendix 106.) A review of the pictorial exhibits in the record will illustrate that industrial development has proceeded down the Sorrento Valley southeast of the subject property until it has substantially filled out up to the subject property. (Finding of Fact No. 8, Joint Appendix 37.)

The "harmful use" issue was never in issue between *the parties* to *this action*. It is a red herring dredged up by *amici* and should be accorded treatment appropriate for dead fish.

VI.

THE SO-CALLED EQUITABLE REMEDIES ARE *INADEQUATE* AND *INEQUITABLE* -- NO SUBSTITUTE FOR JUST COMPENSATION

Thousands of words have been written by Appellee and its *amici*, seeking to convince this Court that only equitable remedies are necessary and that they are adequate substitutes for monetary just compensation, but talk is cheap. With commendable candor, the Solicitor General of the United States exposes the real force behind the words -- not the concerns of philosophical or academic nature, *nor* constitutional concerns -- but financial concerns:

> ". . . as the damage award in the present case illustrates, recoveries in such cases [inverse condemnation] are likely to be substantially larger than those in other types

of constitutional tort suits."
(Brief of the United States as Amicus Curiae, at 30.)

Does this mean that it is acceptable to offer a damage remedy for violations of the Fourth and Eighth Amendments because the usual plaintiff does not have much appeal to a jury, but offer no damage remedy for violations of the Fifth Amendment because it might cost the government too much? Since when is the level of protection for constitutional rights determined by the cost (or potential cost) to the government?

This Court considered similar arguments last term and in the case of *Owen v. City of Independence,* 100 S.Ct. 1398 (1980), came down strongly in favor of compensation for a citizen whose constitutional rights had been violated. The eloquent words of the Court there were:

> "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. *Owen, supra* at 1415.
>
> . . . .
>
> . . . the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. *Owen, supra* at 1416.
>
> . . . .

It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. *Owen, supra* at 1417.

. . . .

After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. *Owen, supra* at 1417.

. . . .

More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it, 'Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'etre.*'" *Owen, supra* at 1418.

Appellant includes the language of the Court at some length because it could not improve upon this forceful statement of the need for the damage remedy in this area. These inspiring principles stand in stark contrast to the current dismal state of the law in California regarding Fifth Amendment guarantees, where the California Court of Appeal is required to state:

> "A local entity's *arbitrary unconstitutional* exercise of the police power which deprives the owner of the beneficial use of his land *does not require compensation*; rather the party's remedy is administrative mandamus (*Agins v. City of Tiburon, supra,* 23 Cal.3d 605, 611)."
>
> Joint Appendix, 66 (emphasis added).

How do you take a petition for writ of mandamus against a continuing course of conduct? What do you mandate? An apology? What about the delay and expense and lost opportunities and blight by reason of litigation for equitable remedies? What if the property owner is successful after years of litigation in obtaining equitable relief, only to find that on remand, the local government entity adopts a similar but slightly different regulation or series of regulations which must be challenged all over again?[2]

The suggested equitable remedies are woefully inadequate -- no substitute for monetary just compensation. For further discussion, see *Brief of the National Association of Manufacturers of the United States of America* as *amicus curiae* in support of Appellant, pp. 9-22, and *Brief of Amicus Curiae San Diego Urban League, Inc.* in support of Appellant, pp. 9-20.

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[2] See, Joint Appendix, 165-68, for a realistic scenario of how this might occur.

CONCLUSION

By reason of a course of conduct by the City aimed at achieving a public purpose, property owner has been denied all practical, beneficial and economic use of its property, the property has for all practical purposes been devoted to the public use which was originally sought through direct condemnation, all without payment of the just compensation guaranteed by the Fifth Amendment.

State courts cannot immunize local government entities from the financial consequences of such arbitrary unconstitutional exercises of the police power. The only constitutionally adequate remedy is money damages.

The judgment below should be reversed and the trial court's judgment for money damages reinstated.

Respectfully submitted,

LOUIS E. GOEBEL

RUTH R. MIJUSKOVIC

GUENTER S. COHN

Attorneys for Appellant

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No. 79-678

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

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Appellant,

vs.

CITY OF SAN DIEGO, et al.,
Appellees.

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E. CLEMENT SHUTE, JR.
SHUTE, MIHALY
& WEINBERGER
396 Hayes St., Suite One
San Francisco, CA 94102
Telephone: (415) 552-7272
Attorneys for
Amici Curiae

WILLIAM M. BOYD
Chief Counsel California Coastal Commission

FRANK R. BROADHEAD
San Francisco Bay Conservation and Development Commission
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTIONS PRESENTED

1. Are Fifth and Fourteenth Amendment issues properly before this Court where a basis of the lower court judgment rests on an application of state law (failure to exhaust administrative remedies)?

2. Have the actions of the City frustrated appellant's property rights where appellant has the opportunity for a reasonable use of its holdings acquired for power plant purposes, has not been frustrated in any effort to pursue its investment-backed expectations with regard to a power plant and where the City's open and public planning process did not constitute inequitable precondemnation activities?

3. If a land use regulatory measure enacted pursuant to the police power should some into conflict with property rights protected by the Fifth and Fourteenth Amendments would a judicial decree of invalidation constitute an appropriate remedy or does the Constitution compel forced purchase?

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Amici have the parties' written consent to file this brief and the letters granting such consent have been filed with the Clerk of the Court.

INTEREST OF AMICI

This brief is respectfully submitted in support of appellee City of San Diego.

The California Coastal Commission, the San Francisco Bay Conservation and Development Commission, and the California Tahoe Regional Planning Agency have extensive

regulatory authority over the proposed use and development of land and water areas within their respective jurisdictions.[1] Protection of the natural resources and environment of the California coastline, the San Francisco Bay and the California portion of the Lake Tahoe Basin are paramount objectives for these agencies. *See e.g. People ex rel. Younger v. Co. of El Dorado* (1971) 5 Cal.3d 480; *CEEED v. California Coastal Zone Conservation Commission, supra; People ex rel. S. F. Bay Con. etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533. Actions taken by these agencies to promote the objective of protection of natural resources have resulted in litigation where landowners have charged that the effect is to have inversely condemned their properties. *See e.g. State of California v. Superior Court* (1974) 12 Cal.3d 237; *Candlestick Properties, Inc., supra.* In these cases, and other similar liti-

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[1]The California Coastal Commission is an agency of the State of California, charged with the duty of developing and enforcing plans for the permanent protection and restoration of the California coastline. Cal. Public Resources Code §§ 30000 et seq. The Commission and its functions are the outgrowth of an extensive planning and regulatory process mandated by the People of California in an initiative adopted in 1972. The constitutionality of that planning and regulatory process has been upheld against constitutional attack. *CEEED v. California Coastal Zone Conservation Commission* (1974) 43 Cal.App.3d 306. The San Francisco Bay Conservation & Development Commission is also a public agency of the State of California. Cal. Gov't Code §§ 66600 et seq. One of the Commission's main purposes is to provide permanent protection for the San Francisco Bay and its shoreline. The Commission's enabling legislation has likewise been upheld against constitutional attack. *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.* (1970) 11 Cal.App.3d 557. The California Tahoe Regional Planning Agency exercises planning and regulatory authority over the California portion of the Lake Tahoe Basin. Cal. Gov't Code §§ 67000 et seq. It too is engaged in litigation where landowners have asserted that its regulatory actions constitute a taking of property.

gation, the agencies have consistently contended that their regulatory actions, taken pursuant to their respective enabling laws, constitute appropriate exercises of the police power, but if they have improperly exercised that power, the remedy is invalidation of the action, rather than an award of damages to the affected landowner. The issues in this case are thus of critical importance to these agencies.

The Office of Planning and Research of the State of California is charged with the responsibility for developing state land use policies, coordinating planning of all state agencies and assisting and monitoring local and regional planning. Cal. Gov't Code §§ 65035, 65040. The Office prepares advisory guidelines to aid local governments in the preparation of general plans as required by Cal. Gov't Code §§ 65300 *et seq.* and § 65040.2. While the Office has no direct or regulatory power over local land use (Cal. Gov't Code § 65035), in its role as advisor to local governments regarding their planning obligations the Office of Planning and Research is vitally interested in the issues raised in this case.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case of appellee City of San Diego and amici curiae Conservation Foundation et al. For purposes of illustration amici have included four appendices to this brief. Appendix A is an aerial photo showing appellant's property from directly overhead. Appendix B is an oblique aerial photo showing appellant's property including that portion within the open space plan area. Appendix C is a composite of maps of the United States Army Corps of Engineers prepared in 1967 showing that part of appellant's property which is within a flood plan. Appendix D is a composite of maps of the Federal Insurance Administration showing that part of appellant's property which is a special flood hazard area.

Further, appellant has realized a substantial economic benefit from its property involved in this case because appellant, as a regulated utility, has had the property included in its rate base thereby realizing a substantial economic benefit from its ownership. See statement of the case of amici curiae Conservation Foundation et al. This evidence is not in the trial court record, but it is taken from official records of the California Public Utilities Commission and amici respectfully submit that it should be taken into consideration by the Court.

SUMMARY OF ARGUMENT

1. The opinion of the California Court of Appeal which appellant challenges in the present case reversed the judgment of the trial court which had concluded that appellant's property had been taken and that just compensation was due to appellant. In the course of reversing the trial court judgment, the opinion did not comment on the validity of the findings of fact or conclusions of law supporting the lower court's judgment. Rather, the appellate court indicated that the absence of any request by appellant to the City for permission to develop the property limited the scope of the litigation to the facial validity of the City's regulatory enactments. This result, premised on the California doctrine of exhaustion of administrative remedies, involved an application of state law. Federal constitutional questions involving an alleged "taking" are not properly before this Court, and it is respectfully submitted that it would be appropriate to dismiss the appeal.

2. As a matter of law the City's actions, either considered individually or as a whole, satisfy the tests which this Court has established as necessary prerequisites to satisfy substantive due process requirements (thereby not violating Fifth or Fourteenth Amendment guarantees). Specifically, appellant has realized economic benefit from its investment and has the opportunity for a reasonable use

of its property, particularly when the entire 412 acre holdings acquired by the company for power plant purposes are considered. Additionally, appellant may pursue its investment-backed expectations with regard to a power plant since the City's open space plan contemplates that possible use and, in any event, the regulatory jurisdiction of the City with respect to such a facility is pre-empted and is vested in the State Energy Resources Conservation and Development Commission. See generally, Cal. Public Resources Code §§ 25000 *et seq.* and particularly §§ 25500 *et seq.* In the same vein, appellant's investment-backed expectations are both inchoate and shifting since appellant argues that it purchased the property for the purposes of a power plant and yet for its own reasons apparently abandoned that intended use and urged to the trial court that an industrial park facility is the highest and best use of the property. Finally, the open and public planning process of the City, including recommendations for acquisition which could not be pursued since the electorate rejected the necessary bond issue, did not give rise to a legal claim. *Agins v. City of Tiburon* (1980) 100 S.Ct. 2138, 2142-43 n.9.

3. When courts have been faced with regulations which if enforced would constitute "takings," they have invalidated those measures because they are unaccompanied by the just compensation which would be necessary to sustain them. *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 136. This approach reflects the proper accommodation between one of the least limitable powers of government (the "police power") and constitutionally protected private property rights. A remedy of forced purchase through the payment of just compensation would amount to government by purchase. *Andrus v. Allard* (1979) ..... U.S. ....., 100 S.Ct. 318, 326. The courts have invoked the remedy of compensation for "takings" where it is apparent that the legislative body contemplated that

remedy. See, e.g. *Rail Reorganization Act Cases* (1974) 419 U.S. 102. In the instant case there was no legislative determination to invoke a requirement of just compensation and the usual and traditional remedy of invalidation, assuming the City's regulations were excessive, is the proper remedy.

ARGUMENT

I

THE PURPORTED FEDERAL CONSTITUTIONAL ISSUES ARE NOT PROPERLY BEFORE THIS COURT

A. A Basis of the State Court's Judgment Was that Appellant's Failure to Apply to the City Limited the Scope of the Case to a Determination of the Facial Validity of the Several Legislative Enactments Affecting Appellant's Property. The Judgment Therefore Resolved the Appeal on the Basis of Principles of State Law

The second Court of Appeal opinion in this case is the operative judgment which is before this Court.[2] See JS, App. G.[3] That opinion reversed the judgment of the trial court. The effect and significance of the reversal is described in the last paragraph of the opinion. Specifically,

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[2]The initial opinion of the Court of Appeal, sometimes relied upon by appellant, has no force or effect either as a judgment or as a statement of any principle of law discussed in that opinion. This is because a hearing was granted as to that opinion by the California Supreme Court thereby vacating the first Court of Appeal opinion. *Knouse v. Nimocks* (1937) 8 Cal.2d 482, 483. The nonexistence of the initia' Court of Appeal opinion is aptly described in *People v. Woods* (1937) 19 Cal.App.2d 556:

> . . . the opinion in that case is resting in a judicial morgue, having succumbed to a painless lethal gas in the form of an inoffensive order by the Supreme Court transferring the case to a higher sphere. *Id.* at 560.

[3]This is a reference to an appendix in the jurisdictional statement. References to the joint appendix will be designated "JA" with appropriate page references.

the court stated regarding appellant: "It has not made application to use or to improve the property, nor has it asked City what development might be permitted." In the same paragraph the court noted that appellant's complaint alleged that the City had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element. The court noted further that the trial court findings and conclusions did not cover these allegations (the allegations were contained in the fourth cause of action of the complaint. See 3A at pp. 32-33).[4] Moreover, nowhere in the opinion did the court render an actual holding as to the findings of fact and conclusions of law of the trial court other than to reverse the judgment and limit the scope of a retrial to the validity of the zoning and general plan enactments of the City. Thus, in effect the opinion rejected the trial court's approach of waiving the requirement of exhaustion of administrative remedies and speculating on how the City might deal with a proper development application by appellant. Therefore, in fact the California doctrine of exhaustion of administrative remedies is a basis of the Court of Appeal opinion.

The Court of Appeal's ruling was perfectly consistent with California law which allows judicial review of the facial validity of an enactment without exhaustion but does not allow, on jurisdictional grounds, review of how ordinances or statutes would be applied. *State v. Superior Court* (1974) 12 Cal.3d 237, 251. In fact, the Court of Appeal may have been prescient since its approach is entirely consistent with the later opinion of this Court

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[4]The same paragraph also made reference to allegations that the zoning and general plan requirements had been unconstitutionally applied by the City. Since it is a fact that appellant has never applied to the City for any development permits, the use of the term "applying" merely referred to the trial court's speculation concerning how the City's various legislative enactments might pertain to the appellant's property.

in *Agins v. City of Tiburon* (1980) 100 S.Ct. 2138, where it was held:

> "Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions. [citations omitted] Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking." *Id.* at 2141.

The long-standing rule in California is that a court which entertains litigation prior to exhaustion of administrative remedies is acting in excess of jurisdiction. See generally, *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280; *Morton v. Superior Court* (1970) 9 Cal.App.3d 982. This rule has been consistently applied in the land use regulatory context. *See e.g. Metcalf v. Los Angeles County* (1944) 24 Cal.2d 267; *South Coast Regional Commission v. Gordon* (1977) 18 Cal.3d 832.

The California rule is in accord with the policy of this Court which has recognized the utility of requiring available administrative processes to be invoked prior to judicial review. See e.g., *Aircraft & Diesel Corp. v. Hirsch* (1947) 331 U.S. 752, 767; *Allen v. Grand Cent. Aircraft Co.* (1954) 347 U.S. 535, 553.

Perhaps most cogently this Court has refused to anticipate constitutional questions in the land use context by refusing to assume that one denial is certain to mean that all use would be prohibited. *Penn Central Transp. Co. v. New York City, supra,* at 136-137.

Since the state court opinion involved the application of the California doctrine of exhaustion of administrative remedies, the case was resolved by application of principles of state law. Where an opinion rests on an independent state ground, this court has consistently refused to review the judgment. See e.g. *Fox Film Corp. v. Mullen* (1935) 296

U.S. 207. The purported "taking" issues, we respectfully submit, are not properly before this Court.[5]

B. Sound Reasons, Including Avoidance of Unnecessary Consumption of Limited Judicial Resources, Support the Wisdom of Requiring an Application to the Appropriate Governmental Body Prior to Judicial Review. The Trial Which Was Held in This Case Presents a Good Example of Why the Planning Process Should Have Occurred Prior to Litigation

The history of the instant case, where a trial occurred in the absence of any administrative action by the City, illustrates the wisdom of allowing the City the first opportunity to interpret and apply its own legislative enactments without the massive time and expense of a trial at which the court must speculate on these matters and in effect become a substitute for the planning process. Here appellant's property is generally at a low elevation, is in a drainage basin at the confluence of three river systems that drain approximately 100 square miles, is in a flood plain and is subject to standing water. Appendices C and D of this brief illustrate those portions of the property lying within a flood plain. Additionally, part of the property is subject to tidal action from the Pacific Ocean and all but a small portion lies within the California coastal zone. Portions of the property have been referred to as marshland, estuary and wildlife refuge. Appendices A and B to this brief illustrate the character of the property.

Not surprisingly, the property is included in the open space element of the City's general plan, but that does not per se prevent all development or use. State law recognizes many potential uses for open space. See Cal. Gov't Code § 65560. It also recognizes that premature

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[5]Even assuming that the opinion is wrong, which we do not believe to be the case, it nevertheless involved an application of state law and would not present federal constitutional issues.

conversion of open space is to be discouraged and the validity of this purpose has been acknowledged. *Agins v. City of Tiburon, supra,* at 2141-42. Importantly, a general plan is always subject to change. *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 118. Moreover, substantial portions of the property retain an industrial zoning and even property in the A-1 zone might be available for light industrial use.

It is apparent, given the characteristics of the property and the complexities of the regulatory provisions pertaining to the property, that complicated planning issues would be presented in the course of determining appropriate uses and siting and proper conditions to protect life and property from floods as well as to protect natural amenities. The City was never given this opportunity and instead the court utilized its limited resources to perform this planning function.

Further evidence of the impropriety of the trial in a case such as this lies in the trial court's finding that no development could proceed unless it was consistent with the open space designation of the general plan. Appellant has relied on this determination by the trial court. See appellant's brief at p. 13. The trial court's determination and appellant's contention are fundamentally erroneous. Initially, San Diego is a charter city, a special category of incorporation under Calfornia law, and as such is not obligated by the consistency requirement of California Government code section 65860.[6]

Furthermore, where, as here, appellant contends that its property rights would be frustrated if not allowed some development, it is simply unfair, unrealistic and somewhat

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[6]Cal.Gov't Code § 65803 is in the same chapter as Cal.Gov't Code § 65860. The former section renders the consistency requirement inapplicable to charter cities. This exclusion has been recognized. *Dale v. City of Mountain View* (1976) 55 Cal.App.3d 101, 108, n.5.

officious for the trial court to impute to the City an intention that it would blindly follow a policy of consistency even though the policy might result in a constitutional violation of property rights. It must be remembered that the City's policy is not compelled by local legislative requirement and in no event could it be applied in circumstances where it would frustrate a higher order of law, namely constitutionally protected property rights. Under these circumstances: "There is no room for a presumption that [the City] will invariably sacrifice private interests to its concept of the public good." *People v. Superior Court* (1979) 91 Cal.App.3d 95, 105.

In sum, the trial court's conclusion that exhaustion of administrative remedies would have been futile was rejected by the Court of Appeal and is an application of state law. Beyond that, sound reasons of judicial economy of resources indicate that trials under these circumstances consume court time, and are costly to the parties, all in an endeavor to speculate as to how a legislative body, the city council, might have interpreted its own legislation. The courts have recognized that deference to legislative bodies includes allowing them the first opportunity to interpret and clarify their own legislative acts. In *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal. App.3d 1012 the court stated:

> "Second, there is a strong policy reason for allowing the governmental body which passed legislation to be given the chance to interpret or clarify its intention concerning that legislation.
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> * * *
>
> The failure of the city to adequately raise and deal with the issue at those hearings leaves this court in the position of having to engage in pure speculation concerning the County's rationale in approving more than 660 units. We may not indulge in that luxury." *Id.* at 1021.

In that case the court applied the exhaustion doctrine to prevent an adjoining city from attacking a county's approval of a private development where the relevant issues were not raised in the county's administrative proceedings. It would seem especially appropriate to provide this opportunity to the City where it is contended that strict application of legislative enactments might frustrate constitutionally protected property rights and where the City's enactments, by their nature, are subject to interpretation.

It is respectfully submitted that due to the lack of ripe federal constitutional issues it would be appropriate to dismiss the appeal.

II

THE ACTIONS OF THE CITY SATISFY CONSTITUTIONAL STANDARDS OF SUBSTANTIVE DUE PROCESS AND DO NOT CONSTITUTE A "TAKING"

A. The City's Regulatory Actions Reflect an Effort to Ameliorate Legitimate and Recognized Problems

The actions of the City, either taken individually or as a whole, satisfy the tests which this Court has laid down as prerequisites for satisfying substantive due process requirements and not invading constitutionally protected property rights. Thus, the sensitive nature of the property involved together with its unique attributes have been noted. The City's actions in attempting to protect life and property from flood hazards and to protect the natural amenities of the property through the open space designation and zoning ordinances are proper subjects of regulation.

In regard to the flood hazard, Congress has found that flood losses are "increasing at an alarming rate" (42 U.S.C.

§ 4002(a)(1)) and "that the Nation cannot afford the tragic losses" to life and property. 42 U.S.C. § 4002(a)(5). The Flood Disaster Protection Act was amended to require the Secretary of Housing and Urban Development to adopt "comprehensive criteria" designed to encourage state and local measures which would "(1) restrict the development of land which is exposed to flood damage where appropriate, (2) guide the development of proposed construction away from locations which are threatened by flood hazard . . . ." 42 U.S.C. § 4102. See *Texas Landowners Rights Ass'n v. Harris* (D.O.C. 1978) 453 F.Supp. 1025, aff'd mem., 598 F.2d 311, cert denied, (1979) 100 S.Ct. 267. National policy thus recognizes the need to be sensitive to construction in flood plains. Appendix D to this brief is a composite map illustrating that the subject property is within a "special flood hazard area" designated pursuant to the federal flood insurance program. Restrictions on development in flood plains have been upheld by the courts. See generally *Turnpike Realty Co. v. Town of Dedham* (Mass. 1972) 284 N.E. 2d 891; *Turner v. County of Del Norte* (1972) 24 Cal.App. 3d 311.

Additionally, the property is a functional part of a local coastal wetland system. The Coastal Zone Management Act (16 U.S.C. §§ 1451 *et seq.*), reflects national policy of restoring or enhancing the resources of the coastal zone. In this regard the "Global 2000 Report to the President" prepared in 1980 by the Council on Environmental Quality warned about the increasing destruction or pollution of coastal wetlands due to development. Specifically, the report indicated that many commercially valuable marine fish species depend on estuaries and salt marshes at some point in their life cycle thus adversely affecting humankind's food supply from continued alterations of wetlands. *Id.* at vol. I, pp. 35-36. American courts have recognized the validity of restrictions on development in these sensitive areas. *Sibson v. State* (N.H. 1975) 336 A.2d 239; *Just v. Marinette County* (Wisc. 1972) 201 N.W.2d 761.

B. Appellant Has the Opportunity for a Reasonable Use of Its Property, Has Not Suffered Interference With Investment-backed Expectations and Cannot State a Legal Claim Based on the Effort to Acquire the Property

In addition to the subject property, appellant acquired additional land for power plant purposes north of Carmel Valley Road and east of Interstate 5. The total holdings of appellant acquired for power plant purposes approximated 412 acres (see appendices A and B). The appellant selected that portion of its holdings which were within the open space designation for purposes of the instant suit in inverse condemnation. There is no indication that its holdings taken as a whole can not provide economic benefit to appellant. For example, some 40 of those acres were sold by appellant in 1979 for substantial consideration. See statement of the case of amici curiae brief of Conservation Foundation, et al.

Segmentation of the company's holdings for purposes of creating a "taking" argument is legally improper. In *Penn Central Transportation Co. v. New York City, supra,* the railroad attempted to divide the air rights above the Grand Central terminal from the terminal itself in order to argue that the air rights had been taken. This contention was expressly rejected:

> " 'Taking' jurisprudence does not divide a single parcel into discreet segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with the rights in the parcel as a whole, here the city tax block designated as the 'land mark site.' " *Id.* at 130.

The appellant's assembled holdings purchased for power plant purposes are the logical basis for determining the

impact of regulations on its property rights. Under the teaching of *Penn Central* it is apparent that the portion of appellant's property within the open space area cannot be discreetly separated for purposes of a "taking" argument.

Appellant also urges that its investment-backed expectations for a power plant have been shattered. Apparently appellant relies on the planning provisions and zoning ordinances in effect at the time of purchase. There are numerous erroneous assumptions in this contention. Initially, this case is totally unlike *Kaiser Aetna v. United States* (1979) ..... U.S. ....., 100 S.Ct. 383, where the government acquiesced in the project and did not assert substantial public rights until the project had been completed. Instead the present case fits the description set forth in *Mugler v. Kansas* (1887) 123 U.S. 623:

> "It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors, but the State did not thereby give any assurance or come under any obligation that its legislation upon that subject would remain unchanged." *Id.* at 669.

Likewise, in *Hadacheck v. Sebastian* (1915) 239 U.S. 394, 410 this Court recognized that property owners have no vested rights because of conditions once obtaining. To recognize a distinct investment-backed expectation based upon regulatory requirements in effect when the land was purchased would amount to a governmental guarantee that public policy, as reflected through regulatory requirements, could never change as to that property. Such a rule would be an unacceptable limitation on one of the most essential and least limitable powers of government. *Hadacheck v. Sebastian, supra* at 410.

Three additional factors make this contention untenable. It appears that the company was able to place its holdings in its rate base as an electric power plant site held for

future use. As a result appellant was authorized to charge rates which included an amount calculated to produce a reasonable return on the subject property. See statement of the case of amici curiae Conservation Foundation, et al. Combined with the sale of 40 acres in 1979 appellant can hardly be heard to say that its property rights have been frustrated through a denial of any economic benefit from its investment. That is just not the case.

Secondly, appellant apparently abandoned its plans for a power plant on the site as a result of a company decision not based on any formal governmental action. RT at 73. Appellant's supposed investment-backed expectations then switched for purposes of trial to a desire for an industrial park, a use which was apparently not contemplated when the property was acquired. Of critical significance is the fact that under California law appellant could have pursued its quest for approval of a power plant without being subject to direct City jurisdiction. Pursuant to state legislation which had been enacted when the suit was filed the State Energy Resources Conservation and Development Commission was created. See generally Cal. Public Resources Code §§ 25000 et seq. Reflecting the principle that only one permitting agency should be involved with power plant siting and licensing, the statute gave the Energy Commission the exclusive power to certify all power plant sites and related facilities in lieu of any permit or other approval required by any other agency, including local governments. Cal. Public Resources Code § 25500. If the Energy Commission were to find that a facility would not conform with applicable local requirements, it could nevertheless approve a power plant if it found that such facilities are required for the public convenience and necessity and that there are not more prudent and feasible means of accomplishing those ends. Cal. Public Resources Code § 25525 [7]

[7]Cal. Public Resources Code § 25501.5 lists a series of sites which in effect would be exempt from Energy Commission jurisdiction.

Thus, had appellant chosen to do so it could have pursued its alleged investment-backed expectations by avoiding the City and bringing itself directly under the regulatory jurisdiction of the State Energy Commission. It seemingly comes with ill grace that appellant converted its alleged investment-backed expectations from a power plant to an industrial park for the purposes of convincing a trial court that its property rights had been frustrated, and now appellant argues to this Court that its investment-backed expectations with regard to a power plant have been frustrated.

Thirdly, the challenged open space plan contemplated the prospect of a nuclear power plant as desired by appellant. The plan states:

> "Again, such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem." (J.A. at p. 160).

Finally, the company (appellant's brief at p. 26) and some of its supporting amici (see e.g. amicus curiae brief of Washington Legal Foundation at p. 10) argue that the planning process by which the property was identified for possible acquisition combined with the bond issue which failed to pass resulted in a deprivation of all economic use and invoked a requirement for the payment of just compensation. This contention is utterly unfounded. In this case the City went through an open and public planning process resulting in reports recommending acquisition of the subject property together with other properties. The city council, after consideration of these reports, put the matter before the voters in the form of a bond proposition which then failed of passage. This planning process did not give

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Subdivision (c) (referring to appellant) does not appear to encompass the Los Penasquitos site. In any event, Cal. Public Resources Code §§ 25501.7 and 25502.3 allow the utility to waive any exclusion thereby bringing itself under the exclusive jurisdiction of the Energy Commission.

rise to a claim for pre-condemnation activities. In *Agins v. City of Tiburon, supra,* this Court concluded that more intrusive activities, including the actual filing of an action in eminent domain and the abandonment of that action, together with a rezoning which occurred at approximately the same time, constituted "good faith planning activity" and could not be considered a "taking". *Id.* at 2142-43 n.9.

In summary, taken individually none of the City's actions can constitute a "taking" and it is difficult to see how the whole can be greater than the sum of its parts. Therefore, even accepting the "course of conduct" approach, no "taking" has occurred.

III

WHERE REGULATORY ACTIONS WOULD CONSTITUTE "TAKINGS" IF ENFORCED, THE COURTS HAVE CONSISTENTLY INVALIDATED THE OFFENDING MEASURES

A. American Courts Have Utilized the Remedy of Invalidation for Land Use Regulations Which Would Otherwise be "Takings"

Contrary to appellant's approach, there can be no absolute dogma that a violation of protected property rights, no matter whether inadvertent or not, results in a constitutionally required remedy of forced compensation. Rather, the courts in dealing with these issues face a delicate problem of resolving potential conflicts between the inherent power of government to regulate (as expressed in the phrase "police power") and the constitutional guarantees accorded to private property through the Fifth and Fourteenth Amendments. It has long been recognized that the power to regulate is one of the most essential and least limitable powers of government. *Hadacheck v. Sebastian, supra,* at 410. On the other hand, property rights have received judicial recognition. *Kaiser Aetna v. United States, supra.* In resolving these potential conflicts it must be recognized that neither the power to regulate nor the protection accorded to property is absolute. In these circum-

stances the courts have determined that the appropriate balance between the two is generally to invalidate regulations which would otherwise be "takings." This approach strikes the proper balance between the needs of the public, as reflected in actions taken by its duly elected representatives, and the rights of private property owners. The remedy of forced purchase through inverse condemnation (or government by purchase—see *Andrus v. Allard, supra,* at 326) does not reflect a proper balance and would strike a crippling blow at legitimate government activities undertaken by regulation.

The legal theory supporting this conceptual framework is sound. A governmental act which would violate property rights is a legal nullity precisely because it is unaccompanied by the offer of just compensation that would be required to sustain it. *See e.g. Penn Central Transp. Co. v. New York City, supra,* at 136.

American courts have followed this approach. In *Fred F. French Investing Co., Inc. v. City of New York* (1976) 385 N.Y.S.2d 5 a property owner sought a declaration of unconstitutionality and damages in inverse condemnation allegedly arising from the rezoning of two private parks. Under the rezoning, the parks were to be made available to the public and the air space above (development rights) was to be usable elsewhere in the Manhattan area subject to approval by regulatory authorities and acceptance of the development rights by a qualified owner. The court held the zoning ordinances to be invalid, but also held that there had been no inverse condemnation and consequently no requirement that the city pay just compensation. In developing this conclusion the court stated:

> As noted above, when the State "takes", that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported "regu-

> lation" may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a "taking", and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid. *Id.* at 8.

The point has been made even more dramatically by the First Circuit Court of Appeals. In *Pamel Corp. v. Puerto Rico Highway Authority* (1st Cir. 1980) 621 F.2d 33, the court unequivocally stated:

> "Our research has disclosed no case in which a federal court has ordered a state or local government unit to pay for diminution of the value of a piece of property caused by a zoning regulation." *Id.* at 35.

The court went on to observe the impropriety of the federal judiciary forcing a remedy of inverse condemnation on state or local authorities.

> "Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy. The federal constitutional right can be secured to the individual without forcing the state to purchase the property. Voiding the offending restriction will make the owner whole." *Id.* at 36.

See also *Jensen v. City of New York* (1977) 42 N.Y.2d 1079. Courts of other states have followed the same approach. *DeMello v. Town of Plainville* (Conn. 1976) 368 A.2d 71; *Gold Run, Ltd. v. Board of County Planning Com'rs* (Colo. 1976) 554 P.2d 317; *Davis v. Pima County* (Ariz. 1978) 590 P.2d 459, *cert. den.* (1979) 39 CCH 3178; *Eck v. City of Bismark* (N.D. 1979) 283 N.W.2d 193.[8]

[8]Innumerable cases follow this concept. Other examples include *Cardon Oil Co. v. Phoenix* (Ariz. 1979) 593 P.2d 656; *Trustees*

B. The Courts Have Ordered Damages Where Such Damages Have Been Contemplated Or Intended by the Legislature. Otherwise Invalidation Has Been Deemed the Appropriate Remedy

Appellant's money damages remedy by way of just compensation would, if accepted, transfer a significant portion of the power of the purse from local and state legislatures to the judiciary with concomitant damage to legislative independence and the budgetary process.[9] The courts have been sensitive to this concern and have awarded damages where they have been legislatively authorized.[10] Any other result would allow the judiciary to usurp the legislative function making commitments of limited funds

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Under Wills, etc. v. Town of Westlake (La. 1978) 357 So. 2d 1299; *Mailman Development Corp. v. City of Hollywood* (Fla. 1974) 286 So. 2d 614; *Gaebel v. Thornbury Township, Delaware County* (Pa. 1973) 303 A.2d 57; *State v. Johnson* (Me. 1970) 265 A.2d 711; *Scrutton v. County of Sacramento* (1969) 275 Cal. App. 2d 412.

[9]A vivid example of this is provided by *Virginia Surface Mining and Reclamation Association v. Andrus* (W.D. Va. 1980) 483 F. Supp. 425, appeal docketed No. 79-1538. There the District Court held that certain provisions of the federal Surface Mining Control and Reclamation Act so burdened the owners of potential coal producing land as to constitute a taking of property in violation of the Fifth Amendment. That federal act applies to a large percentage of the land in the Commonwealth of Virginia, not to mention other states. If the appellant's contentions here are accepted, and if the District Court's judgment in *Virginia Surface Mining* is correct, the conclusion must logically be reached that the United States has inadvertently purchased an enormous portion of the Commonwealth of Virginia. It is most unreasonable to assume that Congress contemplated or intended this result.

[10]Some of appellant's supporting amici charge the California courts with refusing to invoke a remedy of invalidation. See amicus curiae brief of the National Association of Manufacturers at p. 21. This is not the case. In *Furey v. City of Sacramento* (1979) 24 Cal. 3d 862, app. dism'd. . . U.S. . ., 62 L.Ed.2d 403, the landowners

where by legislative action such a commitment would have required a vote by elected officials or even an extraordinary vote of the electorate. *See e.g.* Cal. Constitution, Art. XVI, § 1.

For example, in *Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102 the question was whether certain mandatory provisions of the Act there involved were "takings." It was stated:

> "There are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself." *Id.* at 134.

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alleged that they were precluded from making use of certain sewage facilities which the landowners had been taxed to support through assessments. The case arose on demurrer and the court held, inter alia, that if the allegations were proven the landowners would be entitled to declaratory relief or mandate precluding application of certain disputed land use regulations to their property. *Id.* at 877-78. In *Billings v. Coastal Commission* (1980) 103 Cal.App.3d 729 the court overturned the denial of a permit by the Coastal Commission and in effect instructed the Commission to grant a permit subject to reasonable and appropriate conditions. *Id.* at 298. California courts do not show any reluctance to overturn excessive regulation or to protect property interests as they have struck down overly restrictive zoning ordinances. (*Hoshour v. County of Contra Costa* (1962) 203 Cal.App.2d 602); struck down onerous conditions placed upon permits issued by public agencies (*Bank of America v. State Water Resources Control Bd.* (1974) 42 Cal.App.3d 198); upheld the granting of conditional use permits and other land use permits (*Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374; *Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Com.* (1976) 57 Cal.App.3d 76); upheld the granting of variances (*Zakessian v. City of Sausalito* (1972) 28 Cal. App.3d 794; *Allen v. Humboldt County Bd. of Supervisors* (1966) 241 Cal.App.2d 158) and upheld the approval by local governments of subdivision maps (*Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644; *McMillan v. American Gen. Fin. Corp.* (1976) 60 Cal.App.3d 175).

The entire premise of the opinion was that if the Tucker Act would be available to provide a monetary remedy for any deficiency in payment to the railroads then the availability of that Act would remedy any constitutional infirmity which might otherwise exist because of no provision for compensation. This Court concluded that Congress had not intended to withdraw the Tucker Act grant of jurisdiction to the Court of Claims in suits arising under the Rail Act. It seems apparent that had this Court concluded that damages were not available, via congressional consent, the offending provisions of the Rail Act would have been stricken.[11]

Another example of this approach is in *U.S. Trust v. New Jersey* (1977) 431 U.S. 1. While the issues involved an impairment of contract, it is significant that the repeal by New Jersey of a provision which the Court held impaired the rights of certain bond holders was declared unconstitutional and void. *Id.* at 32. The opinion noted that:

> The state remains free to exercise their powers of eminent domain to abrogate such contractual rights, upon the payment of just compensation. *Id.* at 29, n. 27.

Thus, the Court invalidated the offending measure and left to the legislative body the choice of whether to extinguish those rights by payment of just compensation. See

[11]The amicus curiae brief of the Washington Legal Foundation states that the right of property owners to obtain compensation for unlawful zoning ordinances has been upheld in such cases as *Jacobson v. Tahoe Regional Planning Agency* (9th Cir. 1977) 566 F.2d 1353, modified sub nom. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* (1979) 440 U.S. 391. This suggestion utterly misconstrues the holding of *Lake Country,* and overlooks the opinion of this Court in *Supreme Court of Virginia v. Consumer's Union of the United States* (1980) . . U.S. . ., 64 L.Ed.2d 641, 654 at n.11. There, the Court stated that it had not even necessarily sanctioned injunctive relief against the Tahoe Regional Planning Agency and flatly noted: "We simply affirmed the Court of Appeal's holding that TRPA officials could not be held liable in damages for their legislative acts."

also *United States v. Clarke* (1980) ..... U.S. ....., 100 S.Ct. 1127 (whether an action in inverse condemnation is the proper remedy for a "taking" of Indian land is a question of Congressional intent).

The courts have recognized the overwhelmingly chilling effect that the prospect of money damages would have on needed governmental regulation. For example, in *Charles v. Diamond* (1977) 392 N.Y.S.2d 594, the court observed that extending liability where there had been no de facto appropriation of private property would lead to limitless municipal liability. Specifically, the court stated:

> "More important, the prospect of tort liability might impede equally desirable governmental regulation and legislation since municipal officers might fear subsequent judicial imposition of massive tort recoveries. Open-ended liability could inhibit the enactment of needed, but constitutionally borderline, legislation." *Id.* at 602-05.

The North Dakota court has expressed similar fears. In *Eck v. City of Bismark, supra,* it was stated:

> We agree that the potential consequences of an action for inverse condemnation militate against its availability to challenge the constitutionality of governmental regulation. If actions for inverse condemnation loom in the future, land-use planning might be stymied, the fiscal-budgetary process chaotic, and the financial burdens on the community staggering. Most important, authorization of such an action would enable North Dakota courts to sit as legislative bodies doling out the State and local fisc. *Id.* at 200-01.[12]

[12]The claim that regulatory agencies must be deterred from excessive actions is based on the false premise that these agencies would otherwise act in an abusive manner. The record of the California Coastal Commission in regard to permit matters illustrates that the system works without the destructive presence of a remedy in inverse condemnation. For the period 1973 through May of 1980

This Court has recognized in other contexts the effect that significant financial costs imposed by higher authority can have on normal governmental programs and legislative choices. See *National League of Cities v. Usery* (1975) 426 U.S. 833, 846-47.

Likewise commentators have recognized the inhibiting effect of the compensation remedy:

> Clearly the threat to the governmental pocketbook will intimidate legislative bodies which are considering the imposition of land use regulatory measures. In those very areas where rapid population growth and sprawl have stretched governmental capacity to finance demanded public services, in these very areas the need for rigorous controls is apt to be greatest. Yet the threat of contingent and unplanned-for liability, through inverse condemnation, would especially in these places, deter legislators from enacting the kind of virile measures needed. Instead, financial caution would dictate milky-toast, completely safe and probably ineffective measures. Instead of walking to the brink of its constitutional powers, the legislative body would stay far inside the edge.

Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation,* Urb. L. Ann. 1-2

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the Commission, including its six regional commissions, has held hearings on approximately 39,000 permit applications. Of these approximately 37,500 were granted and approximately 1650 were denied. Approximately 40 of these matters went to litigation (including denials or approvals with conditions to which applicants objected). In 31 of those cases the Commission prevailed and in nine it lost. On remand in the nine cases the Commission lost permits were granted in seven instances. In the remaining two instances the Commission again denied the applications. The Commission prevailed in subsequent litigation on one of those matters and the other was not challenged.

(1968). *See also* Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 Hastings L. J. 1569, 1597 (1977).[13]

It is not simply the threat of monetary damages which has a chilling effect. It is also the cost of litigating an action in which damages is a possible remedy, as opposed to an action in which invalidation is the result. Where a court has invalidated a regulation, the case is over. However, in an action for damages the parties must proceed to try the issue of the fair market value of the property with all the attendant complexities and technicalities of an eminent domain proceeding. In states such as California, the costs of the litigation, if the landowner is successful, are taxable

[13]There have been innumerable law review articles written on this subject. A central one this Court has cited (*Penn Central Transp. Co. v. New York City, supra*) is Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967). Additionally, several writers have questioned the propriety of a monetary remedy (*see, e.g.*, Delafons, *Land Use Control in the United States* (2d ed. 1969) at 110-11; Mandelker, *Inverse Condemnation: The Constitutional Limits* (1966) Wis. L. Rev. 3, 48-49). A number of writers have suggested legislative provision for damages in certain cases of regulation (*see, e.g.*, Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 Fla. St. U. L. Rev. 35 (1974); Rose, *A Proposal for Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 Real Estate L.J. 635 (1974); Costonis, *The Chicago Plan, Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harv. L. Rev. 574 (1972); Krasnowiecki and Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. Pa. L. Rev. 179 (1961). Some commentators have advocated that the damage remedy is excessive (*see, e.g.*, Girard, *Agins: A Step in the Right Direction*, Land Use L. & Zoning Dig. (September 1979); Magavern, *The Evolution and Extension of the New York Law of Inverse Condemnation*, 24 Buff. L. Rev. 273 (1975); Clark and Kidman, *The Relationship of Just Compensation to the Land Use Regulatory Power*, 2 Pepperdine L. Rev. 79 (1975); Comment, 26 Stan. L. Rev. 1439 (1974); Beuscher, *Land Use Controls: Cases and Materials* (3d ed. 1964) at 538-50; Note, 66 Harv. L. Rev. 1134 (1953)).

to the regulatory body. Cal. Code of Civil Procedure § 1036. This amount includes the owner's "reasonable attorney, appraisal and engineering fees actually incurred . . . ." *Id.* The property owner is also entitled to interest from the date of taking. As a result, the cost to a public agency from a successful inverse condemnation action is far more than simply the market value. Even if a public agency is successful and prevails in the appellate courts, it will not recover its complete defense costs. *Briggs v. State of California* (1979) 98 Cal.App.3d 190, appeal dism'd (1980) 100 S.Ct. 3005, vividly demonstrates this point. There the California Court of Appeal reversed an inverse condemnation judgment against the state. The record in that case discloses that the state's defense expenditures were more than $235,000. The trial court concluded that the landowner's costs were more than $200,000 and her reasonable attorney's fees were $751,000. The presence of the potential for incurring all or part of such costs, even in a successful action, is an additional factor inhibiting to any regulatory agency.

In summary, the chilling effect of a remedy in just compensation would be particularly unfortunate in the present case involving a flood plain and wetland. The City would be faced with the impossible choice of purchasing the entire flood plain area, which of course the City's electorate rejected, or adopting regulations which would be so weak as to not deal effectively with the problem of avoiding flood damage and avoiding remedial public expense. Moreover, the inability, due to the fear of fiscal impact, to implement national policy by protecting wetland areas will result in the loss of such areas. Since the constitutional lines in "taking" cases are not clear the only prudent course for a fiscally responsible government would be to avoid any regulations which might result in a loss of even one case out of one hundred since that loss could wreak havoc on the local budget.

C. Recent Decisions of This Court Involving Constitutional Torts by Federal Officials or 42 U.S.C. § 1983 Do Not Imply a Remedy of Just Compensation and, in Fact, Land Use Regulation Is Perhaps the Classic Example of "Special Circumstances Counseling Hesitation" Where Money Damages Would be Inappropriate

In *Carlson v. Green* (1980) 100 S.Ct. 1468 it was alleged that a federal prisoner died from failure to receive proper medical attention. The alleged behavior by the federal defendants amounted to tortious conduct. In the course of allowing the estate of the prisoner to seek damages against federal defendants, this Court noted two exceptions where damages would be inappropriate. The first exception is when there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at p. 1472.

Land. use regulation presents the classic example of special circumstances because of the strong potential for conflict between the power to regulate as an inherent power of government and constitutionally protected property rights. As previously noted, neither is absolute nor subsumes the other. The ability of elected officials to freely exercise their conscience in enacting legislation which they perceive as promoting the public welfare would be dealt a crippling blow by the requirement of forced purchase in the event of excessive regulation. Another aspect of the special circumstances involved with land use regulation is the potential for affecting federal-state relationships through federal judicial intrusion into the domain of state and local governments which traditionally deal with land use matters. See *Carlson v. Green, supra,* at 1474, n. 11; *Pamel Corp. v. Puerto Rico Highway Authority, supra,* at 36. It is one matter for the judiciary to evolve rules governing the conduct of federal officials and another to invoke those same rules ipso facto against state and local officials where principles of federalism "counsel hesitation."

The second factor noted in *Carlson* was the presence of an alternative remedy which has the sanction of Congress. *Carlson v. Green, supra* at 1492. This factor would seem to have a more direct bearing in relationships between the federal judiciary and the executive branch as structured by congressional action. In any event, however, it is more than apparent that the remedy of invalidation and/or injunction, always available in the land use context, is a fully effective alternative remedy eliminating the need to impose a requirement of just compensation. See *Pamel Corp. v. Puerto Rico Highway Authority, supra,* at 36. On the other hand, in *Carlson* where an estate brought action, there was obviously no remedy except monetary damages. See *Davis v. Passman* (1979) 442 U.S. 228, 245. Insofar as congressional sanction of an alternative remedy would be a necessary element of an action against state or local officials, it is apparent that invalidation has been the traditional remedy in the land use area and arguments to the contrary cannot be substantiated. See e.g. *Nectow v. Cambridge* (1928) 277 U.S. 183 (zoning classification declared invalid); *Pamel Corp. v. Puerto Rico Highway Authority, supra* at 35.

In *Owen v. City of Independence* (1980) ..... U.S. ....., 40 CCH S.Ct. Bull. B1738, the Court dealt with a city which had sullied the reputation of its police chief in an egregious manner during the course of discharging him. The opinion noted the impropriety of monetary damages where "countervailing considerations counsel otherwise" *Id.* at 1768. The present case does not come to this Court raising issues directly under 42 U.S.C. 1983 (the statutory basis of the action in *Owen*). But to the extent that the policy considerations expressed in that case are relevant to an analysis of whether there is a constitutionally implied remedy of just compensation, the land use regulatory process, for all the reasons just discussed, is perhaps the best

example of the presence of countervailing considerations indicating the impropriety of monetary damages.[14]

CONCLUSION

For the foregoing reasons amici curiae respectfully submit that the appeal in this case be dismissed or alternatively that the judgment of the California Court of Appeal be affirmed.

Dated: October 6, 1980

E. CLEMENT SHUTE, JR.
SHUTE, MIHALY & WEINBERGER
Attorneys for Amici Curiae

WILLIAM M. BOYD
Chief Counsel California Coastal Commission
FRANK R. BROADHEAD
San Francisco Bay Conservation and Development Commission
Of Counsel

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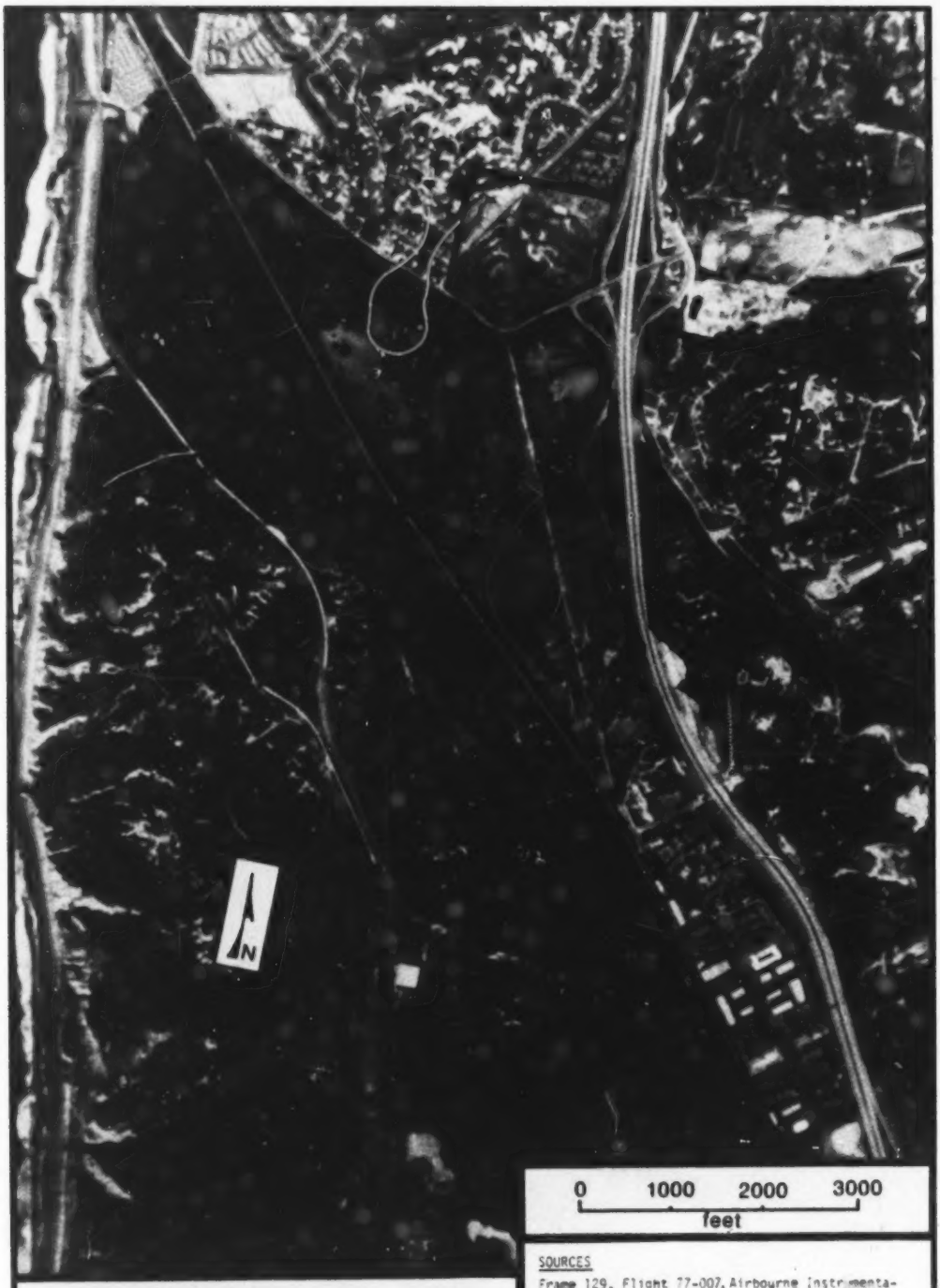
[14]Amicus curiae San Diego Urban League, Inc. argues against exclusionary zoning and deplores the increased costs of housing. Neither of these issues are remotely involved in the instant case. In any event there is no rational connection between awarding property owners just compensation and providing relief to third parties who are victims of exclusionary practices. The concern expressed over housing costs is properly directed to a lawmaking body. The mix of uses and densities assigned by a local government is a matter of legislative discretion so long as the actions taken do not infringe on fundamental rights or are not arbitrary or unreasonable. If challenged actions are unreasonable, the proper remedy, and the one most beneficial to the affected persons, would be invalidation or injunctive relief.



Portion of NASA Public Domain Aerial Photo (taken Jan. 1,1977) showing SDG&E Property

SOURCES

Frame 129, Flight 77-007, Airbourne Instrumentation Research Program, National Aeronautic and Space Administration, January 13, 1977

SDG&E property boundaries mapped by Technical Services Division, California Coastal Commission, September 1980

APPENDIX A

California Dept. of Navigation and Ocean Development Aerial Photo (taken April 16,1972) showing SDG&E Property and Area Designated as Open Space

Area Designated as Open Space

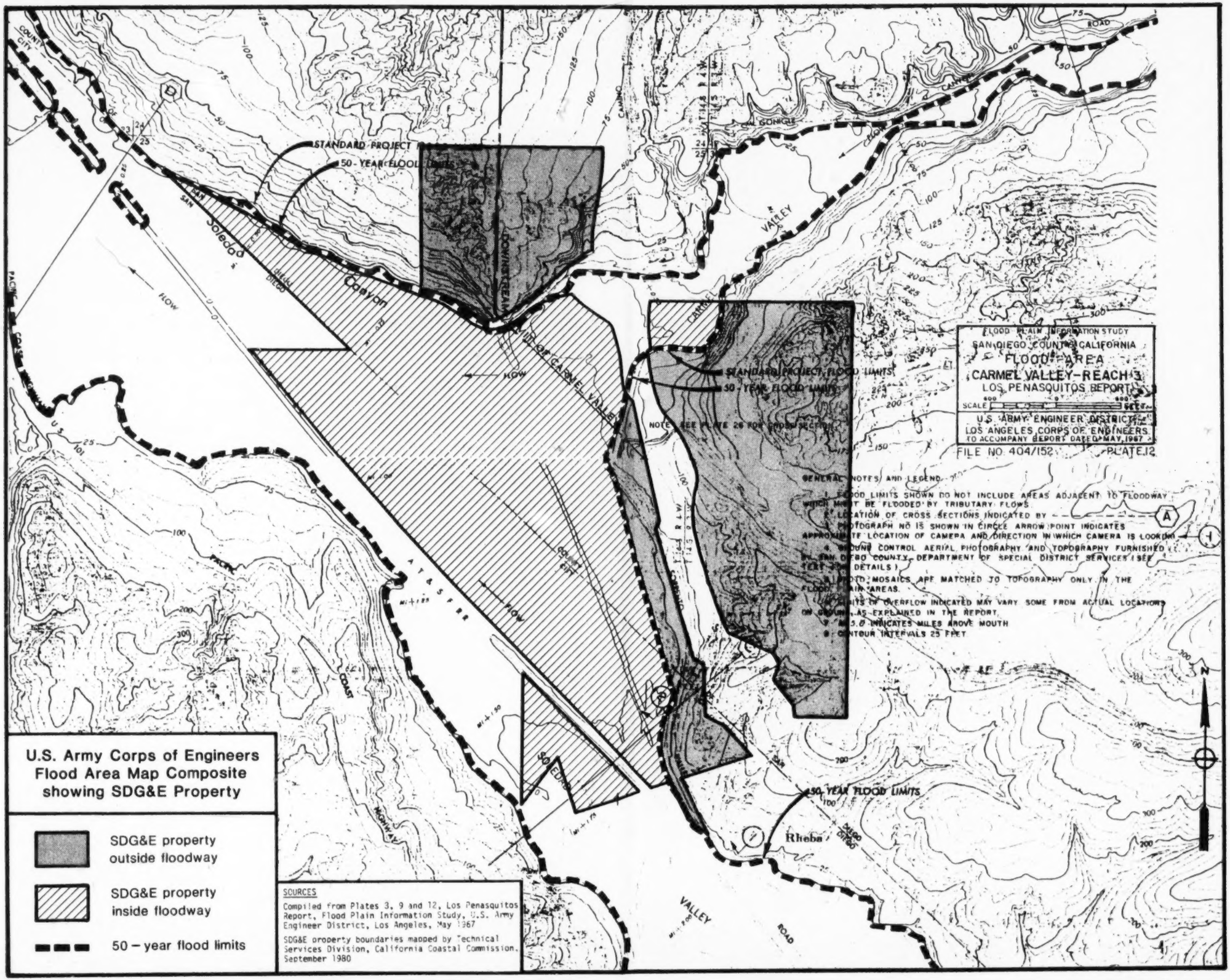
Other Land Owned by SDG&E

SOURCES

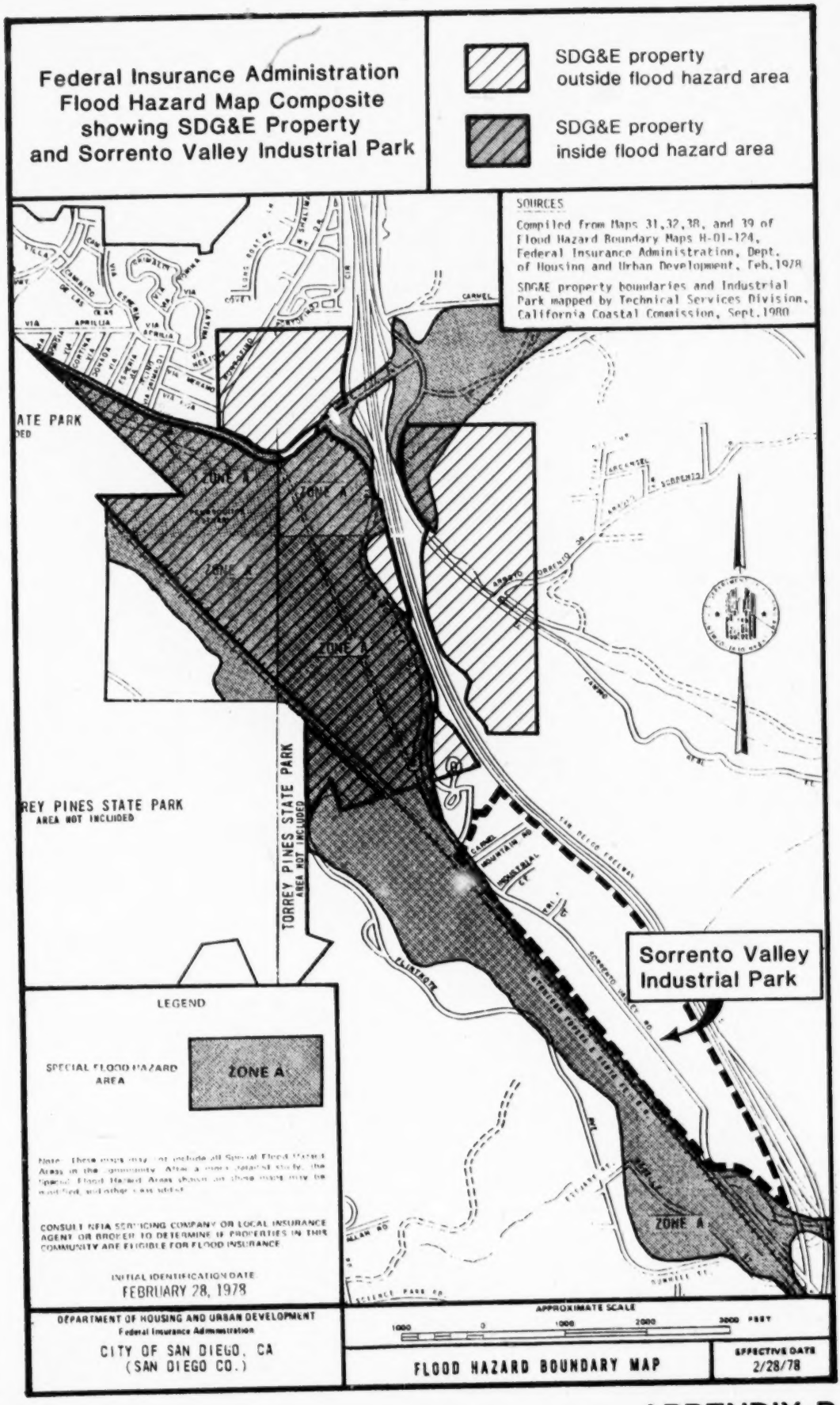
Frame 68, Carnahan et al, Coastal Oblique Aerial Flight, Comprehensive Ocean Area Plan, California Dept. of Navigation and Ocean Development, April 16, 1972.

SDG&E property boundaries and Open Space areas added by Technical Services Div., San Diego, California Coastal Commission, September 1980

APPENDIX B


U.S. Army Corps of Engineers
Flood Area Map Composite
showing SDG&E Property
SDG&E property
outside floodway
SDG&E property
inside floodway
50 – year flood limits
SOURCES
Compiled from Plates 3, 9 and 12, Los Penasquitos Report, Flood Plain Information Study, U.S. Army Engineer District, Los Angeles, May 1967
SDG&E property boundaries mapped by Technical Services Division, California Coastal Commission, September 1980
FLOOD PLAIN INFORMATION STUDY
SAN DIEGO COUNTY, CALIFORNIA
FLOOD AREA
CARMEL VALLEY-REACH 3
LOS PENASQUITOS REPORT
U.S. ARMY ENGINEER DISTRICT
LOS ANGELES CORPS OF ENGINEERS
TO ACCOMPANY REPORT DATED MAY, 1967
FILE NO. 404/152
PLATE 12
STANDARD PROJECT FLOOD LIMITS
50-YEAR FLOOD LIMITS
GENERAL NOTES AND LEGEND
1. FLOOD LIMITS SHOWN DO NOT INCLUDE AREAS ADJACENT TO FLOODWAY WHICH MUST BE FLOODED BY TRIBUTARY FLOWS
2. LOCATION OF CROSS SECTIONS INDICATED BY
3. PHOTOGRAPH NO IS SHOWN IN CIRCLE ARROW POINT INDICATES APPROXIMATE LOCATION OF CAMERA AND DIRECTION IN WHICH CAMERA IS LOOKING
4. GROUND CONTROL AERIAL PHOTOGRAPHY AND TOPOGRAPHY FURNISHED BY SAN DIEGO COUNTY DEPARTMENT OF SPECIAL DISTRICT SERVICES (SEE TEXT FOR DETAILS)
5. PHOTO MOSAICS ARE MATCHED TO TOPOGRAPHY ONLY IN THE FLOOD PLAIN AREAS.
6. LIMITS OF OVERFLOW INDICATED MAY VARY SOME FROM ACTUAL LOCATIONS ON GROUND, AS EXPLAINED IN THE REPORT.
7. M 5.0 INDICATES MILES ABOVE MOUTH
8. CONTOUR INTERVALS 25 FEET
Carmel Valley
Rhoda
Solana Beach
Del Mar
Pacific Coast Highway
Interstate 5
Camino Del Mar
Camino Del Sur
Carmel Valley Road
Flow
50 FEDS
50-YEAR FLOOD LIMITS

APPENDIX C


Federal Insurance Administration
Flood Hazard Map Composite
showing SDG&E Property
and Sorrento Valley Industrial Park
SDG&E property
outside flood hazard area
SDG&E property
inside flood hazard area
SOURCES
Compiled from Maps 31,32,38, and 39 of
Flood Hazard Boundary Maps H-01-124,
Federal Insurance Administration, Dept.
of Housing and Urban Development, Feb.1978
SDG&E property boundaries and Industrial
Park mapped by Technical Services Division,
California Coastal Commission, Sept.1980
ATE PARK
DED
REY PINES STATE PARK
AREA NOT INCLUDED
TORREY PINES STATE PARK
AREA NOT INCLUDED
ZONE A
Sorrento Valley
Industrial Park
LEGEND
SPECIAL FLOOD HAZARD
AREA
ZONE A
CONSULT NFIA SERVICING COMPANY OR LOCAL INSURANCE
AGENT OR BROKER TO DETERMINE IF PROPERTIES IN THIS
COMMUNITY ARE ELIGIBLE FOR FLOOD INSURANCE
INITIAL IDENTIFICATION DATE
FEBRUARY 28, 1978
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Federal Insurance Administration
CITY OF SAN DIEGO, CA
(SAN DIEGO CO.)
APPROXIMATE SCALE
1000 0 1000 2000 3000 FEET
FLOOD HAZARD BOUNDARY MAP
EFFECTIVE DATE
2/28/78

APPENDIX D

Supreme Court, U.S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

No. 79-678

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,

Appellant,

v.

CITY OF SAN DIEGO, et al.,

Appellees.

On Appeal from the California Court of Appeal,
Fourth Appellate District, Division One

AMICI CURIAE BRIEF OF THE STATES OF COLORADO, DELAWARE, HAWAII, ILLINOIS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, NEW YORK, OHIO, OREGON, VERMONT, WASHINGTON and WISCONSIN

J.D. MacFARLANE
Attorney General of Colorado
MARSHALL D. BRODSKY
Assistant Attorney General
1525 Sherman Street
Denver, Colorado 80203

RICHARD S. GEBELEIN
Attorney General of Delaware
REGINA M. SMALL
State Solicitor
JUNE D. MacARTOR
Deputy Attorney General
Department of Justice
State Office Building
820 North French Street
Wilmington, Delaware 19801

WAYNE MINAMI
Attorney General of Hawaii
State Capitol Building
415 South Beretania Street
Honolulu, Hawaii 96813

TYRONE C. FAHNER
Attorney General of Illinois
GEORGE W. WOLFF
Assistant Attorney General
188 West Randolph Street, Suite 2315
Chicago, Illinois 60601

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
GARY KEYSER
Assistant Attorney General
7434 Perkins Road, Suite C
Baton Rouge, Louisiana 70808

RICHARD S. COHEN
Attorney General of Maine
CABANNE HOWARD
Assistant Attorney General
State House
Augusta, Maine 04333

STEPHEN H. SACHS
Attorney General of Maryland
PAUL F. STRAIN
THOMAS A. DEMING
Deputy Attorneys General
One South Calvert Building
Baltimore, Maryland 21202

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
STEPHEN M. LEONARD
Assistant Attorney General
One Ashburton Place, 19th Floor
Boston, Massachusetts 02108

WARREN SPANNAUS
Attorney General of Minnesota
KENT HARBISON
Special Assistant Attorney General
515 Transportation Building
St. Paul, Minnesota 55155

RICHARD H. BRYAN
Attorney General of Nevada
STEPHEN C. BALKENBUSH
Deputy Attorney General
Heroes Memorial Building
Carson City, Nevada 89710

ROBERT ABRAMS
Attorney General of New York
State Capitol
Albany, New York 12224

WILLIAM J. BROWN
Attorney General of Ohio
COLLEEN NISSL
Assistant Attorney General
State Office Building, 15th Floor
30 East Broad Street
Columbus, Ohio 43215

JOHN M. BROWN
Attorney General of Oregon
JOHN R. McCULLOCH, JR.
Solicitor General
WILLIAM F. GARY
Deputy Solicitor General
100 State Office Building
Salem, Oregon 97310

M. JEROME DIAMOND
Attorney General of Vermont
BENSON D. SCOTCH
Assistant Attorney General
109 State Street
Montpelier, Vermont 05602

SLADE GORTON
Attorney General of Washington
CHARLES B. ROE, JR.
Senior Assistant Attorney General
Temple of Justice
Olympia, Washington 98501

BRONSON C. LaFOLLETTE
Attorney General of Wisconsin
LINDA BOCHERT
Assistant Attorney General
114 East State Capitol
Madison, Wisconsin 53702

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Lovequist v. Conservation Commission, 393 N.E.2d 858 (Mass.1979)	2

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16 U.S.C.§§1451 et seq.	2
Washington Rev. Code Ann. §§90.58.010 et seq.	2

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AMICI CURIAE BRIEF OF THE STATES OF COLORADO, DELAWARE, HAWAII, ILLINOIS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, NEW YORK, OHIO, OREGON, VERMONT, WASHINGTON and WISCONSIN

INTRODUCTION

Pursuant to Rule 36(4) of this Honorable Court, the States of Colorado, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, New York, Ohio, Oregon, Vermont, Washington and Wisconsin hereby submit this amici curiae brief in support of the appellees City of San Diego, et al.

INTEREST OF THE AMICI STATES

In the case at bar, appellant contends that certain planning requirements and zoning ordinances of the City of San Diego constitute a "taking" of its property. The opinion of the California Court of Appeal, before this Court for review, indicated that the appropriate remedy for land use regulatory actions which "take" property is invalidation through mandamus or declaratory relief rather than an award of damages.

The cities and counties of each of these amici administer various zoning and land use measures. Some of the cities and counties of these amici have adopted ordinances designed to control their rates of growth and to ensure the adequate provision of municipal services. See, e.g., Einsweiler, Gleeson, Ball et al., Comparative Descriptions of Selected Municipal Growth Guidance Systems, A Preliminary Report, in 2 Management and Control of Growth 283 (R. Scott ed. 1975). In response to

the federal Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.), many of these amici, like California, have enacted comprehensive coastal zone management laws. See, e.g., Wash. Rev. Code Ann. §§90.58.010 et seq. Some of the amici have also enacted legislation designed to protect the resources of the wetlands of their states. See, e.g., Just v. Marinette County, 201 N.W. 2d 701 (Wis. 1972); Department of Natural Resources v. Lynchester Sand and Gravel Corp., 334 A.2d 514 (Md. 1975); Hayes v. Yount, 552 P.2d 1038 (Wash. 1976); Lovequist v. Conservation Commission, 393 N.E. 2d 858 (Mass. 1979).

Any or all of these land use regulatory provisions may adversely affect the value of privately held property. For that reason the decision of this Court will extend far beyond the immediate impact on the City of San Diego. Indeed, each of these amici emphatically join with California in asserting that adoption of appellant's position would paralyze each and every one of these regulatory measures and would inhibit the adoption of any significant regulatory measures in the future.

CONCLUSION

Each of these amici has reviewed the amici curiae brief submitted by the State of California by and through the California Coastal Commission, et al. Each amici respectfully joins in California's contention that invalidation, rather than monetary damages, is the appropriate remedy for a constitutionally impermissible regulatory action, and therefore urges that the judgment of the California Court of Appeal be affirmed.

Respectfully submitted,

J.D. MacFARLANE
Attorney General of Colorado
MARSHALL D. BRODSKY
Assistant Attorney General
1525 Sherman Street
Denver, Colorado 80203

RICHARD S. GEBELEIN
Attorney General of Delaware
REGINA M. SMALL
State Solicitor
JUNE D. MacARTOR
Deputy Attorney General
Department of Justice
State Office Building
820 North French Street
Wilmington, Delaware 19801

WAYNE MINAMI
Attorney General of Hawaii
State Capitol Building
415 South Beretania Street
Honolulu, Hawaii 96813

TYRONE C. FAHNER
Attorney General of Illinois
GEORGE W. WOLFF
Assistant Attorney General
188 West Randolph Street, Suite 2315
Chicago, Illinois 60601

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
GARY KEYSER
Assistant Attorney General
7434 Perkins Road, Suite C
Baton Rouge, Louisiana 70808

RICHARD S. COHEN
Attorney General of Maine
CABANNE HOWARD
Assistant Attorney General
State House
Augusta, Maine 04333

STEPHEN H. SACHS
Attorney General of Maryland
PAUL F. STRAIN
THOMAS A. DEMING
Deputy Attorneys General
One South Calvert Building
Baltimore, Maryland 21202

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
STEPHEN M. LEONARD
Assistant Attorney General
One Ashburton Place, 19th Floor
Boston, Massachusetts 02108

WARREN SPANNAUS
Attorney General of Minnesota
KENT HARBISON
Special Assistant Attorney General
515 Transportation Building
St. Paul, Minnesota 55155

RICHARD H. BRYAN
Attorney General of Nevada
STEPHEN C. BALKENBUSH
Deputy Attorney General
Heroes Memorial Building
Carson City, Nevada 89710

ROBERT ABRAMS
Attorney General of New York
State Capitol
Albany, New York 12224

WILLIAM J. BROWN
Attorney General of Ohio
COLLEEN NISSL
Assistant Attorney General
State Office Building, 15th Floor
30 East Broad Street
Columbus, Ohio 43215

JOHN M. BROWN
Attorney General of Oregon
JOHN R. McCULLOCH, JR.
Solicitor General
WILLIAM F. GARY
Deputy Solicitor General
100 State Office Building
Salem, Oregon 97310

M. JEROME DIAMOND
Attorney General of Vermont
BENSON D. SCOTCH
Assistant Attorney General
109 State Street
Montpelier, Vermont 05602

SLADE GORTON
Attorney General of Washington
CHARLES B. ROE, JR.
Senior Assistant Attorney General
Temple of Justice
Olympia, Washington 98501

BRONSON C. LaFOLLETTE
Attorney General of Wisconsin
LINDA BOCHERT
Assistant Attorney General
114 East State Capitol
Madison, Wisconsin 53702

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAN DIEGO GAS & ELECTRIC CO.,
Appellant,

v.

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Appellees.

On Appeal from the Court of Appeal of the State of California

BRIEF OF THE CONSERVATION FOUNDATION, DON'T TEAR IT DOWN, NATIONAL AUDUBON SOCIETY, NATIONAL CENTER FOR PRESERVATION LAW, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS AND SIERRA CLUB AS AMICI CURIAE IN SUPPORT OF APPELLEES

DAVID BONDERMAN
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

CHRISTOPHER J. DUERKSEN
THE CONSERVATION FOUNDATION
1717 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae

Of Counsel:

MICHAEL MANTELL
Washington, D.C.

ANTONIO ROSSMANN
San Francisco, Calif.

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QUESTIONS PRESENTED

1. Whether, on the present procedural posture of the case where the California Court of Appeal has reversed the trial court's decision, determined that Appellant has not examined its administrative remedies, and concluded that the trial judge failed to consider important factual issues, the present case is appropriate for review by this Court?

2. Whether Appellant has shown that the adoption of an "open space" plan and the rezoning of a small portion of its property to prohibit general industrial uses amounts to a "taking," where Appellant purchased the property for a power plant and that use is not precluded; Appellant included the property in its rate base and obtained a rate of return as a utility on the property after the property was supposedly "taken;" and Appellant made no attempt to show the impact of the rezoning on its entire property but has already recovered nearly as much as it originally paid for the property?[1]

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[1] Amici believe that an analysis of these issues makes it plain that no "taking" has occurred, so that consideration of the remaining issue—whether a damage remedy is constitutionally required where a land use regulation unduly burdens private property—is unnecessary. In the event, however, that the Court does reach that issue, Amici fully support the position of Amici Curiae National Trust for Historic Preservation *et al.* as set out in their brief.

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 42(2), the above listed organizations file this brief as Amici Curiae in support of Appellees. Letters of consent from counsel for the parties have been filed with the Clerk.

Amici are organizations concerned with the protection and promotion of the natural and built environment and with land use regulation and planning. All Amici have a major interest in the encouragement of environmentally and economically sound land use policies and are seriously concerned by the implications for environmental, historic preservation and land use regulations unless this Court

sustains the decision below. A more detailed description of each Amicus appears in Appendix A to this brief.

STATEMENT OF THE CASE

Appellant's claim that its property has been unconstitutionally burdened ignores the factual context and miscomprehends the procedural status of the case. Amici believe it is useful for a full understanding of Appellant's claims to set forth this background.[2]

1. *The Los Penasquitos Lagoon.*[3] Los Penasquitos Canyon is the last major ecologically intact riverine woodland in San Diego. At its narrow ocean outlet lies Los Penasquitos Lagoon, a 385-acre marsh complex consisting of mud flats, salt flats and tidal and nontidal salt marsh, with occasional deep channels. Much of the marsh is under water and all of it is within the floodplain onto which drain the waters of the Los Penasquitos and Soledad Canyons. The lagoon is among the few such areas left in Southern California and has substantial ecological importance as a feeding and resting area for shore birds and as a spawning and nursery ground for fish and shellfish.

A picture of the Los Penasquitos Lagoon appears at page 4. As can be seen from the picture, with the exception of the U.S. 101 bridge built in 1932 and the Santa Fe Railroad tracks, the lagoon area is entirely undeveloped. The portion of the lagoon west of the tracks is owned almost entirely by the State of California; the portion east of

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[2] California courts take judicial notice of laws, ordinances, public documents, and other similar matters of record. *See, e.g., Dale* v. *City of Mountain View*, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976). The California Evidence Code gives great latitude to courts in this regard. *See* Cal. Evidence Code §§ 452-53.

[3] The description of the Los Penasquitos Lagoon is based upon California Department of Fish and Game, The Natural Resources of Los Penasquitos Lagoon and Recommendations for Use and Development, Coastal Wetlands Series #7 (April 1974); California Coastal Commission, Revised Draft Working Paper—Los Penasquitos Lagoon (1978); and City of San Diego, Progress Guide and General Plan 120, 124-26 (1979).

the tracks is owned by Appellant and is the subject of this litigation. Appellant's assertion that the surrounding area is primarily industrial (App. Br. at 28) is inaccurate. As the photograph and map at pages 4-5 show, to the east is a large undeveloped area and to the north and northwest are single family residential developments. The Torrey Pines State Reserve adjoins the property on the west, and there is a light industrial park to the south.

2. *Appellant's acquisition and treatment of its property.* In 1966 Appellant acquired approximately 412 contiguous acres of property from a number of sellers for a total of around $3.5 million. The purchases included approximately 206 acres within the Los Penasquitos Lagoon which are contested here.[4]

At the time of its purchase, Appellant consistently indicated that it assembled the 412 acres as a single tract for

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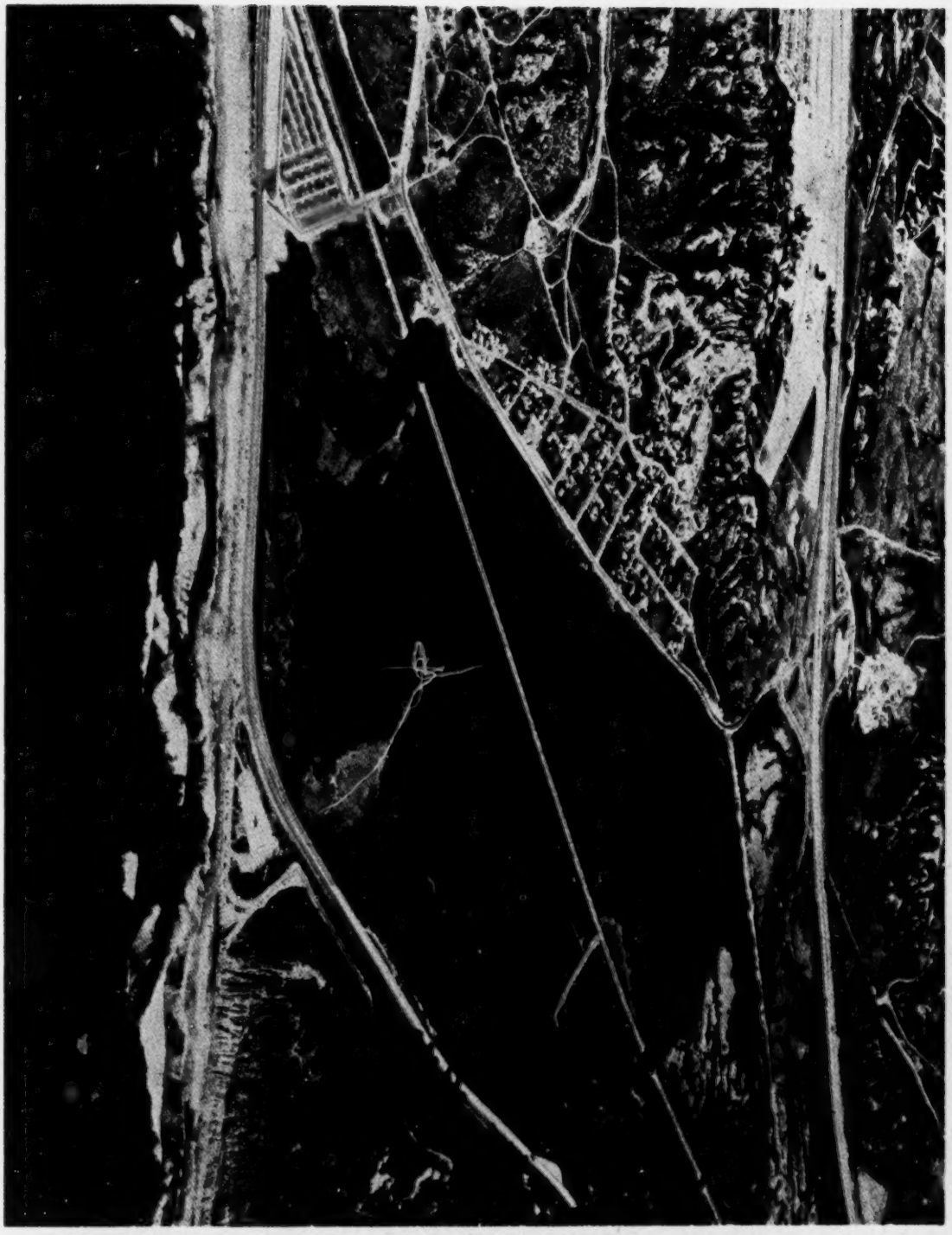
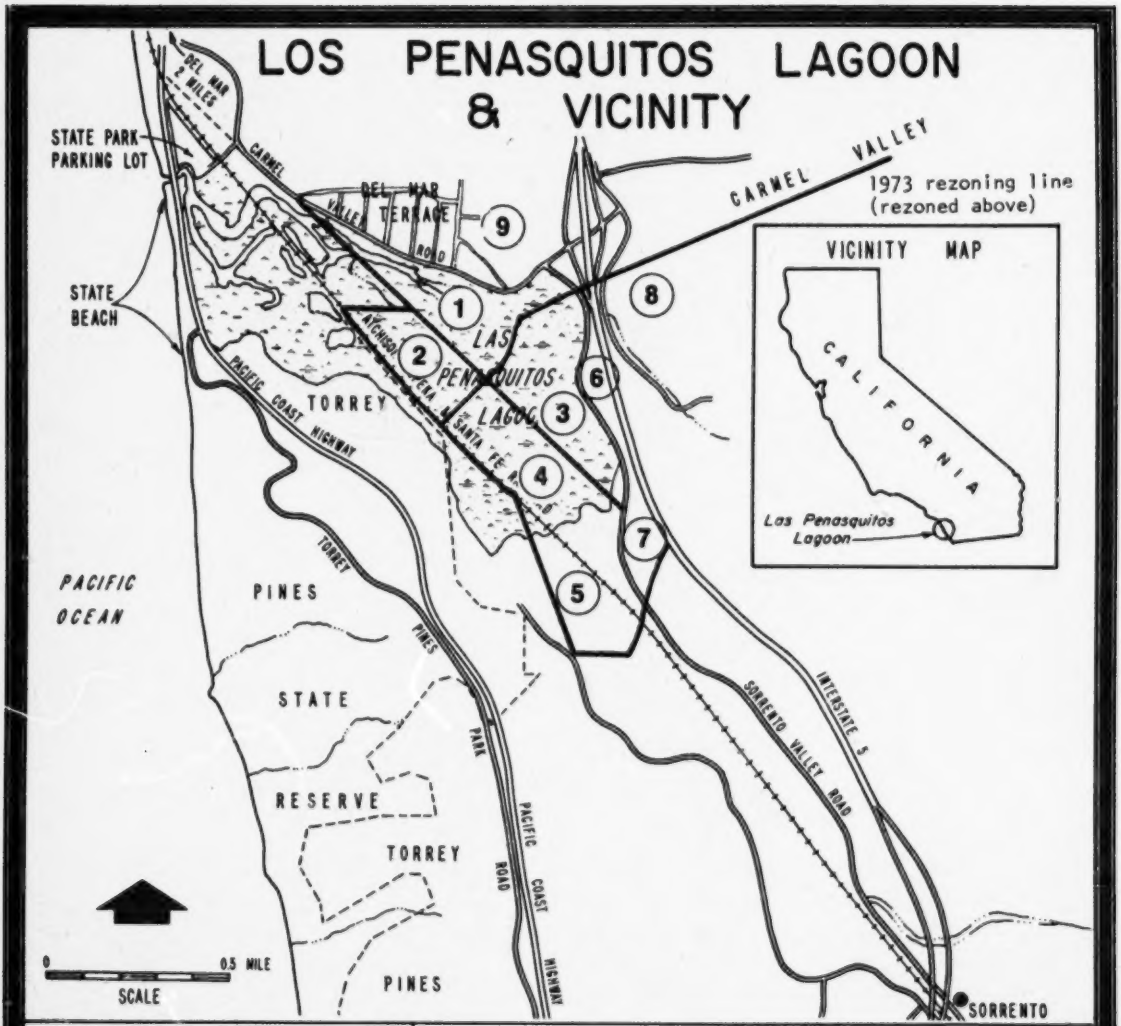
[4] Amici have generally used the acreage and dollar figures contained in Appellant's brief (App. Br. at 5), although those figures cannot be confirmed by a detailed examination of the trial record. Indeed, the record shows that during the trial the parties referred to identical portions of the property by different designations at different times (*compare* the reference to parcel B-2 on Plaintiff's Exhibit 1-B at T 137 *with* a reference to the same parcel as R-2 on Plaintiff's Exhibit 30 at T 448-49) and at other times used the same designation to refer to different parcels (*compare* the two uses of B-1 to designate different parcels on different exhibits at T 316). To make matters worse, Appellant's interrogatory answers contain different acreages (*see* Answer to Defendants' Interrogatory 1, which asserts that the subject property, aside from the land acquired from the City of San Diego, totals 232.78 acres) from its trial claims (*see* J.A. 5, 16-20, at which Appellant claimed a taking of only 165.90 acres) and Appellant's filings with the California Public Utilities Commission contain still another set of figures. *See* California Public Utilities Commission, *Application 55627 et seq.* (*San Diego Gas & Electric Co.*), testimony of John P. Hughes, Exhibit 121, pp. 1-8, 1-9 (Feb. 23, 1976). The purchase price of the entire tract is reported as $3.7 million in Mr. Hughes' testimony, *supra*, at page 1-9, and as $3.5 million in Appellant's property account file at the California Public Utilities Commission. See n.7, *infra*.



Photograph from California Department of Fish and Game, The Natural Resources of Los Penasquitos Lagoon, Recommendations for Use and Development, Coastal Wetlands Series #7 (April 1974).



SDG & E
Sorrento Valley Property

Plate from: California Dept. of Fish and Game, The Natural Resources of Los Penasquitos Lagoon, 1974.

(NOTE: all acreages and delineations are approximate only)

Subject Property	Approx. Acreage	Zoning Before 1973	Zoning After 1973	Open Space Designation
1	63	A-1-1*	A-1-10	yes
2	38	M-1-A	A-1-10	yes
3	48	A-1-1	A-1-1**	yes
4	66	M-1-A	M-1-A	yes
5	12	M-1-A	M-1-A	no
6	8***	A-1-1	A-1-1	no
7	11	M-1-A(LC)	M-1-A(LC)	no
Contiguous Parcels				
8	126	A-1-1	A-1-1	no
9	40	R-1-5	R-1-5	no

* Small section was zoned R-1-5.
** Stipulated for possible future industrial use.
*** 3.6 acres subject of 60 year lease.

one purpose only—use as a future power plant site. Indeed, a portion of the property was acquired from Appellee City of San Diego on Appellant's specific representation that it would use the site only as a power plant and that the "development of the cooling water facilities [for the power plant] could restore and save major portions of the slough (Los Penasquitos Lagoon) as a fish and wildlife haven." [5] Appellant admitted in the trial court and states in its brief here that it purchased the property for a power plant. (App. Br. at 5).[6]

Appellant made similar representations to the California Public Utilities Commission ("PUC") which has general regulatory authority over Appellant. Beginning in 1966, the year of the acquisition, Appellant reported to the PUC that the 412 acres were an "electric plant [site] held for future use" and thus the entire $3.5 million in property acquisition costs should be included in Appellant's rate base.[7] Under the relevant California law, Appellant as a

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[5] Submission of F.W. Devore, Appellant's Manager of the Engineering Land Department, to City of San Diego Planning Commission at 2-3 (October 10, 1972).

[6] In a few places in its Brief (*e.g.*, at page 26), Appellant suggests that it actually intended to use the property for general "industrial" purposes and cites the trial judge's now reversed Finding 3 as support for that claim. Finding 3 (J.A. 36), however, does not refer to any proposed general industrial use, and there is nothing in the record to support a finding that Appellant ever intended to use the property for anything but a power plant. For example, in the trial court Appellant listed the reasons for its acquisition of the property as "the possible future construction of [a] power plant on the subject property as part of a long range electrical generation resource planning . . . ." Answer to Defendants' Interrogatory 1(e).

[7] Pursuant to Cal. Public Utilities Code §§ 792-93, the California PUC and its predecessor adopted the uniform system of accounts for utilities set forth in 18 C.F.R. Part 101. *See* 48 C.P.U.C. 253 (1948), 40 C.R.C. 777 (1937). Under this system "account 105" is used for future utility sites and included in the rate base. 18 C.F.R. Part 101, Electric Plant Instructions, § 5B(1) at 301. All

regulated utility had its rates set by the PUC at a level designed to afford Appellant a PUC-estimated rate of return which varied between 8.00% and 8.75% on its rate base.[8] Accordingly, continuing long after the present lawsuit was brought, Appellant received from its customers a state-authorized profit on the 412 acres. The estimated return on Appellant's investment ultimately totalled some $1,483,140,[9] more than forty percent of Appellant's total original outlay for the property.

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412 acres were included in this account. *See* California PUC, *Application 55627 et seq.* (*San Diego Gas & Electric Co.*), testimony of John P. Hughes, Exhibit 121, pp. 1-8, 1-9 (Feb. 23, 1976).

[8] Cal. Public Utilities Code § 739 empowers the Public Utilities Commission to establish a rate of return for utilities and the PUC has done so from time to time. The PUC then sets the authorized charges for each utility so as to generate sufficient revenue to attempt to provide the PUC-estimated rate of return. During the period relevant to Appellant's claims in this case, the PUC rates of return have been as follows: September 30, 1972-November 8, 1974—8.0% (74 C.P.U.C. 93, 105 (1972)); November 9, 1974-July 29, 1977—8.75% (77 C.P.U.C. 495, 500 (1974)). *See* San Diego Gas & Electric Company, 1976 Annual Report, p. 27.

[9] This figure is derived by (i) multiplying the PUC-estimated annual rate of return as described in the proceeding note (or a prorated fraction thereof, where the rate involved was in effect for less than a full calendar year) times the $3.5 million property cost Appellant included in its rate base for each period from September 30, 1972 until July 29, 1977 and (ii) totalling the revenue for the various periods to obtain an overall figure. This period was used because, although the property was added to Appellant's rate base in 1966, the PUC apparently did not consider the new rate base until its next rate proceeding which took effect on September 30, 1972. In 1976, two years after the present lawsuit was filed, the California PUC required Appellant to delete the property from its rate here, apparently on the theory that Appellant no longer intended to use the property as a plant site. *See* California Public Utilities Commission, *Applications Nos. 55627 et seq.* (*San Diego Gas & Electric Co.*), testimony of John P. Hughes, Exhibit 121, pp. 1-9 (February 23, 1976). However, the PUC apparently did not consider this new rate base until its next rate proceeding, which was approved July 29, 1977. Thus, for rate purposes the 412 acres were considered by the PUC as part of the rate base between September 30, 1972 and July 29, 1977.

3. *Zoning and use of Appellant's property.* As previously noted, Appellant acquired its approximately 412 acres in 1966. Some 206 acres were located north and east of the Los Penasquitos Lagoon. This portion of Appellant's property was when acquired and is still zoned in part "R-1-residential" and in part "A-1-agricultural." Under San Diego's zoning laws both classifications permit, as of right, single family homes, power plant substations, and other uses.[10] Appellant sold approximately 40 acres north of the lagoon and Carmel Valley Road for $1.7 million in 1979,[11] but still owns the remainder of this property.

The other 206 acres of Appellant's property, as noted, are within the Los Penasquitos Lagoon. At the time of Appellant's purchase, approximately 104 acres within the lagoon were zoned "M-1-A-industrial," which allows a variety of uses, including central electric plants and power substations.[12] Approximately 38 of these acres were rezoned "A-1-agricultural" in 1973, but the other 66 acres remain "M-1-A." The additional 102 acres within the lagoon have been zoned "A-1-agricultural" since before Appellant acquired the property, but the City has indicated that it would consider use of 50 of these acres for general industrial purposes. (App. Br. at 7). A map showing Appellant's property is reproduced on page 5.

It should be noted that the San Diego zoning laws specifically allow the Planning Commission to permit any structure or use by a public utility—including a power plant—*in any zone* by issuing a conditional use permit.[13] Thus, insofar as Appellant's use of its property for a power plant is concerned, the rezoning was of no significant effect. Both prior to and after the rezoning Appellant could

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[10] San Diego City Code § 101.0404.

[11] *See* Federal Energy Regulatory Commission, San Diego Gas & Electric Co., Uniform System of Accounts File, Part 1 (1-25-65 to present) (Sept. 4, 1979).

[12] San Diego City Code §§ 101.436-37.

[13] San Diego City Code § 101.0506.A.3.

erect a central electric plant as of right on a portion of the property (104 acres before and 66 acres after) but would require a conditional use permit from the Planning Commission for the remainder of its property. Moreover, under California law, as described below, the siting of power plants is subject to state control and the relevant state agency is empowered to override local zoning laws. Appellant never applied for any permit to construct a power plant on its property.

It is also noteworthy that Appellant's own witness testified that 79 of the lagoon acres subject to this lawsuit are sufficiently under water that any use would require three to four feet of fill, which would be economically infeasible and otherwise unrealistic. (T. 669-70).

4. *The San Diego "Open Space" plan.* In the mid-1960s and early 1970s the California state legislature responded to development pressures and environmental deterioration [14] by establishing a number of land use planning mech-

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[14] In the 1950s and early 1960s, California, which was then strongly growth oriented and placed very few restrictions on land developers, experienced a substantial population influx and, as a result, tremendous development pressures. Much of this development pressure was concentrated on its coastal areas. One-third of the land in the California coastal counties is publicly owned and uninhabited, yet 65% of the State's more than 20 million people reside in these 15 counties. Research Department, Security Pacific Bank, California Coastal Zone Economic Study: Profile 2-1, 3-1 (April, 1975). Developers built residential and industrial subdivisions on mountains, in canyons and dry river beds, in lagoons, and at other unsuitable localities. The environmental qualities which had originally attracted people to California suffered dramatically, and disasters requiring substantial federal and state emergency aid occurred in urban and suburban residential areas as homes were washed away by floods and landslides. Accounts of the most recent such events, which took place earlier this year in southern California, are contained in, *e.g.*, *Newsweek*, "A Plague of Rain and Mud," March 3, 1980, p. 33 ("Even before the storms subsided, critics began blaming Los Angeles public officials for allowing developers to build homes in the disaster-prone canyons and hills"); *Los Angeles Times*, Feb. 16, 1980, p. 1; *Los Angeles*

anisms. In 1971, the legislature enacted "open space" legistion requiring all California cities and counties to adopt "open space" plans and to enact "open space zoning ordinance[s]" consistent with these plans. Cal. Government Code §§ 65563, 65566, 65567, 65910.[15] It was the specific intention of the California legislature that cities and counties use their regulatory "open space" zoning powers in a manner which would not unreasonably burden privately-owned properties:

> "The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor." Cal. Government Code § 65912.

In response to the California "open space" legislation, in 1972 the City of San Diego began work on a Comprehensive Plan which was to include an "open space element." The first such plan was adopted by the San Diego City Council on June 19, 1973, and designated the 206 acres of Appellant's property in the Los Pennasquitos Lagoon as "open space." City of San Diego, City Council Resolution No. 208180.[16] However, the San Diego plans have indicated that

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Times, Feb. 18, 1980, p. 1, 3; *Los Angeles Times,* Feb. 19, 1980, pp. 3, 16. This unplanned California urban sprawl led to serious concern on the part of citizens and state agencies. *See, e.g., Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 120, 109 Cal. Rptr. 799, 805, 514 P.2d 111, 117 (1973).

[15] The California statutes required each city and county to adopt an interim "open space" plan not later than August 31, 1972 and a permanent "open space" plan not later than December 31, 1973. Cal. Government Code § 65563.

[16] During 1972 and 1973, the City of San Diego also considered acquiring Appellant's lagoon property and designated the parcel for purchase with funds from a bond issue which was ultimately rejected by the voters in September, 1973. Therefore, the City made no further attempts to purchase the property. (App. Br. at 6-8,

the characterization of Appellant's Los Penasquitos Lagoon property as "open space" was consistent with Appellant's proposed use of the property as a site for a power plant, as well as with a number of other uses which did not require destruction of the wetlands.

For example, the initial "open space" plan stated as follows:

> ". . . [T]he San Diego Gas and Electric Company has a large (240 acre) ownership [in the Los Penasquitos Lagoon] which it intends to utilize as the location of a nuclear power plant sometime in the 1980s. Again such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem . . . ." A Plan for the Preservation of Natural Parks for San Diego, City of San Diego General Plan, p. 24 (April, 1973).

This paragraph was repeated verbatim in the 1975 successor "open space" plan.[17]

Pursuant to California law, "open space" plans may be amended up to three times annually, and San Diego's plan has been amended numerous times at the instance of the City, community groups, and affected property owners.[18] Appellant never suggested that the "open space" plan be amended in any respect insofar as its lagoon property was concerned.

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10). As this Court held only recently in *Agins* v. *City of Tiburon*, 100 S. Ct. 2138, 2140 n.3 (1980), the City's aborted attempt to acquire the property raises no issue relevant to the consideration of the case presently before the Court.

[17] Torrey Pines Community Plan, p. 53 (1975). This plan, which applied only to the Torrey Pines area of San Diego, was adopted by the San Diego City Council on March 6, 1975. City of San Diego, City Council Resolution No. 212729.

[18] *See* Cal. Government Code §§ 65361, 65860; *see, e.g.*, City of San Diego, City Council Resolution No. 208179 (June 19, 1973), No. 212069 (Nov. 21, 1974), No. 213655 (June 26, 1975), No. 217247 (Dec. 8, 1976), No. 219722 (Nov. 22, 1977), and No. 221450 (July 25, 1978).

5. *Other regulations affecting Appellant's lagoon property.* Because 206 acres of Appellant's property are located in the Los Penasquitos Lagoon, filling of its property would be necessary before any development could be undertaken. (App. Br. at 5). Accordingly, Appellant's property is subject to state and federal regulatory agencies over which the City of San Diego has no control.

(a) *California Coastal Commission.* Since passage of the California Coastal Act in 1972, a permit from the California Coastal Commission has been required before any development can take place in environmentally sensitive areas such as the Los Penasquitos Lagoon. However, the Act specifically allows energy related facilities where there is no feasible less environmentally damaging alternative and reasonable measures are taken to mitigate adverse effects. *See* Cal. Public Resources Code §§ 30000, 30233. Appellant has never applied for any permit from the Coastal Commission to develop this property.

(b) *California Energy Conservation and Development Commission.* Since 1974 the siting of power plants in California has been subject to the preemptive jurisdiction of the California Energy Conservation and Development Commission ("Energy Commission"). The Commission makes the final determination as to the location of all power plants and is specifically authorized to override local zoning, open space, and other land use regulations. Cal. Public Resources Code § 25525. Accordingly, for land use regulation purposes the ultimate decision as to whether Appellant will be permitted to use its lagoon property for a power plant site (assuming that Appellant ever applies to do so) will rest with the Commission, not with the City of San Diego.

(c) *Federal programs.* Pursuant to Section 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1344, a dredge and fill permit from the Corps of Engineers is necessary for development of Appellant's lagoon property. Appellant has never applied for any such permit.

6. *Proceedings below.* Appellant filed the present lawsuit on August 15, 1974, seeking as alternative remedies "inverse condemnation" damages and injunctive relief. (J.A. 4-15). However, Appellant pursued only the damage claim and the case was tried below by both sides solely as an "inverse condemnation" matter.[19] Perhaps for that reason, not all of the public record and judicially noticeable facts described above were brought to the trial judge's attention.

Specifically, Appellant did not disclose that it had included the 206 acres which it claimed had been "taken" in 1973 in its assets for rate base calculations, and hence was earning a state-guaranteed income on the property for the time during and after the supposed "taking" occurred. As noted, Appellant ultimately received some $1,483,140 as a return on the "taken" property. And although the trial judge was aware that only a part of Appellant's contiguous property was the subject of the suit, he never considered the impact of San Diego's regulations on Appellant's entire parcel. Thus, while Appellant did show that it had paid approximately $2 million dollars for the 206 lagoon acres in 1966 and that those 206 acres would be worth more if unrestricted industrial use were possible, the trial judge never evaluated the impact upon Appellant's contiguous acreage outside the lagoon. As mentioned above,

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[19] This case does not in fact involve "inverse condemnation" as that term has commonly been used. Thus, this Court has noted that "inverse condemnation" is simply a shorthand description for a money damage remedy to recover the value of property in circumstances which are the " 'inverse' or 'reverse' of a condemnation proceeding"—that is, where instead of exercising its condemnation powers, a government physically seizes or occupies property leaving it to the landowner to initiate proceedings. *United States* v. *Clarke*, 100 S. Ct. 1127 (1980). *See also* Nichols, *Eminent Domain* § 8.1[4][a] (rev. 3d ed. 1979). However, a consequence of trying the case on an "inverse condemnation" theory rather than as an overregulation by the police power was that Appellant secured not only damages, but also "severance damages" and attorney's fees. (J.A. 46).

Appellant sold approximately 40 of those acres for $1.7 million in 1979. Thus, it is now the case that between the proceeds of the sale and the amounts obtained from its rate base return, Appellant has received almost as much as it originally paid for the property and still has 372 acres, including 166 acres outside the lagoon.

In addition, the trial judge concluded that the City would in the future refuse to permit general industrial development in the lagoon and its floodplain, that this would preclude all reasonable future use of the Appellant's property, and that the City was therefore responsible for Appellant's damages, if any. In reaching this legal conclusion, the judge overlooked two major considerations. First, Appellant had purchased the property for use as a power plant, which is not precluded. Second, all uses in the lagoon are subject to approval by the California Coastal Commission and other regulatory agencies, and use of the site as a power plant is subject to the preemptive jurisdiction of the California Energy Commission, so that various state and federal agencies, not the City of San Diego, will make the final decision on permitted uses of Appellant's property.

Furthermore, although under California law the requirement of exhaustion of administrative remedies is jurisdictional and Appellant had never attempted any development or sought any permits, the trial judge excused Appellant on the ground that seeking a permit would be futile. (J.A. 42). In this respect the trial judge simply misunderstood the legal effect of the zoning and the "open space" plan because, as noted, they both specifically reserve the possibility of construction of a power plant. Moreover, as the Court of Appeal later pointed out, the trial judge also misunderstood the California law on exhaustion.[20]

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[20] California law requires as a jurisdictional matter that all administrative remedies be exhausted before resort is had to the courts. *South Coast Regional Commission* v. *Gordon*, 18 Cal. 3d 832, 558 P.2d 867, 135 Cal. Rptr. 781 (1977); *People* v. *Superior*

As a result of the trial proceedings, the trial judge erroneously concluded that a "taking" had been shown and awarded damages. (J.A. 41-43). The California Court of Appeal initially affirmed the lower court decision, holding that exhaustion was unnecessary, that Appellant had suffered a "taking," and that damages should be awarded. (J.A. 49-61).

However, after remand of the case by the California Supreme Court for reconsideration in light of its decision in *Agins* v. *City of Tiburon*, 24 Cal. 3d 266 (1979), 598 P.2d 25, 157 Cal. Rptr. 372, *aff'd*, 100 S. Ct. 2138 (1980), the California Court of Appeal reconsidered both aspects of its earlier opinion. In addition to applying the statements of the California Supreme Court in *Agins* that damages were not available under the circumstances, in its second opinion the Court of Appeal held that there were disputed facts on the "taking" issue not covered by the trial judge's opinion and that the record did not show that Appellant was entitled to proceed without exhausting its administra-

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Court, 91 Cal. App. 3d 95, 154 Cal. Rptr. 54 (1979); *Grant* v. *Superior Court*, 80 Cal. App. 3d 606, 145 Cal. Rptr. 699 (1978). An exception is permitted in rare cases where further resort to the administrative process would be futile. *Ogo Associates* v. *City of Torrance*, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974) (where city passed ordinance specifically to preclude a particular project, owner not required to seek variance before suing). The trial judge seemed to think that because Appellant's property had been rezoned in part and placed in an "open space" category, the futility exception was met. The reasoning of the trial judge would do away with the exhaustion rule, because in virtually every litigated case some adverse action is taken by the governing body to precipitate the dispute. In fact, the present case is not within the futility exception because there was no specific prejudgment of Appellant's case. *Gantner & Mattern Co.* v. *California Employment Commission*, 17 Cal.2d 314, 318, 109 P.2d 932, 934 (1941); *People* v *Superior Court, supra*, 91 Cal. App. 3d at 102, 154 Cal. Rptr. 57 (1979) (futility exception applies only where the administrative agency "has declared [in advance] what its ruling will be in the particular case").

tive remedies. (J.A. 66).[21] The Court therefore reversed the trial judge's findings and judgment and sent the case back for further proceedings. This appeal followed.

SUMMARY OF ARGUMENT

1. *The California court was plainly correct in remanding Appellant's "taking" claim for further proceedings.* Faced with the record and judicially noticeable facts described above, the California Court of Appeal quite correctly found that the trial judge had not adequately dealt with a number of questions, both factual and legal, on the "taking" issue, and sent the case back for further proceedings.

First, under California law, exhaustion of administrative remedies is necessary before a landowner may file suit to challenge land use regulations. *South Coast Regional Commission* v. *Gordon,* 18 Cal. 3d 832, 558 P.2d 867, 135 Cal. Rptr. 781 (1977); *Metcalf* v. *Los Angeles County,* 24 Cal. 2d 267, 148 P.2d 645 (1944); *People* v. *Superior Court,* 91 Cal. App. 3d 95, 102-05, 154 Cal. Rptr. 54, 57-59 (1979). Indeed, this Court has recognized the same principle in *Agins* v. *City of Tiburon,* 100 S. Ct. 2138 (1980).

Second, the record in this case is simply incomplete. As pointed out previously, the trial judge failed to rule upon or consider a number of important factual and legal issues. This Court has repeatedly recognized that the kinds of factual infirmities found in the record by the California Court of Appeal make the present case inappropriate for review by this Court, at least at this stage. *See Moor* v. *Texas & N.O.R. Co.,* 297 U.S. 101, 105 (1936); *Mishkin* v. *New York,* 383 U.S. 502, 512-14 (1966).

2. *Appellant has not established a "taking" of its property.* The facts of Appellant's case, which have been discussed in detail previously, are important to the California

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[21] The Court specifically noted that Appellant "has not made application to use or improve the property nor has it asked City what development might be permitted." (J.A. 66).

court's disposition of the case. In brief, the critical facts are as follows:

—Appellant paid $3.5 million for a tract of 412 acres, of which the property involved in this litigation is a part. Appellant purchased the entire tract as a site for a future power plant, a use not precluded by either the zoning (which is largely unchanged from that in effect at the time of purchase) or the "open space" plan.

—Appellant included the entire tract in its rate base and, by operation of California utility law, has received an estimated return on its investment of $1,483,140. In addition, Appellant sold a 40-acre portion of the tract for $1.7 million. Thus, Appellant has now obtained in sales and rate of return revenues nearly all that it paid for the entire property, but still has 372 acres left, including 166 acres as to which Appellant has claimed no interference at all.

This Court has repeatedly held in police power regulation cases where no physical intrusion is involved that an unconstitutional burdening of property does not occur if the owner retains some reasonable use of the property so that it is not rendered valueless. *E.g., Andrus* v. *Allard*, 444 U.S. 51 (1979); *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 674 n.8 (1976); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). Applying this principle and the specific tests set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124-28 (1978), it is plain that no "taking" has occurred. Appellant has not been precluded from its intended use of its property and, as noted, the property is far from valueless. Indeed, there has been no demonstrated substantial economic impact upon Appellant at all.

Moreover, Appellant has never attempted to develop the site for a power plant—supposedly its intended use of the property and, as noted, one permitted by the San Diego ordinances—or for anything else. This Court in *Agins* v. *City of Tiburon*, 100 S. Ct. 2138 (1980), made it clear that

a property owner is in no position to claim a "taking" unless either the ordinances on their face leave no reasonable use of the property or the property owner has attempted its development and been refused. 100 S. Ct. at 2142. This principle should apply with particular force in the present case where other state and federal agencies, not the City of San Diego, will make the final decision as to the use of Appellant's property.

ARGUMENT

I. THE CALIFORNIA COURT PROPERLY REMANDED THIS CASE TO THE TRIAL COURT AND REVIEW HERE IS NOT APPROPRIATE

Appellant's basic claim is that the trial court found as a factual matter that Appellant had been denied all reasonable use of its property. (App. Br. at 26-30). But, as discussed previously, while the trial judge did indeed enter findings of fact as cited by Appellant, the trial court's decision was reversed by the California Court of Appeal because there were disputed fact issues not dealt with by the trial court in its findings and conclusions and because the trial court was wrong in failing to require Appellant to exhaust its administrative remedies. (J.A. at 66). The Court of Appeal correctly remanded the case for further proceedings.

Under California law, exhaustion of administrative remedies is necessary before a landowner may file suit to challenge land use regulations. *South Coast Regional Commission* v. *Gordon,* 18 Cal. 3d 832, 558 P.2d 867, 135 Cal. Rptr. 781 (1977); *Metcalf* v. *County of Los Angeles,* 24 Cal.2d 267, 148 P.2d 645 (1944); *People* v. *Superior Court,* 91 Cal. Rptr. 54, 57-59 (1979). Indeed, this Court has recognized the same principle in *Agins* v. *City of Tiburon,* 100 S. Ct. 2138 (1980).

In addition, the record in this case is simply incomplete. As pointed out previously, the trial judge failed to

rule on or consider a number of important factual issues, and as a result the present record is riddled with factual infirmities. This Court has repeatedly held that it will not consider a case where "[t]he far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision." *Mishkin* v. *New York*, 383 U.S. 502, 512-14 (1966). *See Moor* v. *Texas & N.O.R. Co.*, 297 U.S. 101, 105 (1936).

The Amicus brief of the State of California deals with these issues in detail, and Amici respectfully refer the Court to that discussion.

II. APPELLANT HAS NOT DEMONSTRATED ANY UNCONSTITUTIONAL BURDENING OF ITS PROPERTY

The trial court's now reversed findings aside, the relevant evidence of record and information judicially noticeable in the California courts is as follows:

(a) In 1966 Appellant bought 412 acres of property in northern San Diego, including the 206 acres subject to this suit which are located in the Los Penasquitos Lagoon and are either under water or in a floodplain. At the time of the purchase, 104 of the acres in the lagoon were zoned for industrial use and 102 were zoned "agricultural," which allowed residential and agricultural uses as of right. In 1973, 38 of the industrial acres were rezoned agricultural; at the same time the Planning Commission indicated its willingness to consider general industrial uses on 50 of the "agriculturally" zoned acres. No other zoning changes have occurred. A power plant is an as of right use in industrial zones but not in agricultural zones. However, the Planning Commission may allow power plants in any zone. Thus, the rezoning had no significant effect on Appellant's ability to build a power plant.

(b) There was no "open space" plan in effect when Appellant bought its property, but a series of such plans have been adopted from time to time by the City of San

Diego, commencing in 1973. While these plans are not legally binding, they have specifically noted that the construction of a power plant on Appellant's property could be consistent with the "open space" designation. Thus, the "open space" plan had no significant legal or practical effect on Appellant's ability to build a power plant.

(c) At the time it purchased the 412 acres, Appellant notified the California Public Utilities Commission that it intended to use all of the property as a future power plant site and for that reason was including all of its costs for the acreage in its rate base. Appellant sought and obtained a guaranteed rate of return as a utility on its investment in all 412 acres, including the property subject to this litigation. The total estimated return received by Appellant was $1,483,140.

(d) In 1979, Appellant sold 40 of its 412 acres (not including any of the property subject to this litgation) for $1.7 million. Thus, between its sale of a portion of the property and allowed rate of return, Appellant has already received over $3.1 million on its $3.5 million investment. In addition, Appellant still has a total of 372 acres, including 166 acres outside the lagoon and not subject to the "open space" plan.

(e) Appellant's property, due to its location in the Los Penasquitos Lagoon, is subject to regulation by the California Coastal Commission and the U.S. Army Corps of Engineers. Moreover, the Energy Commission has preemptive authority as to the location of power plants, including the right to override local zoning controls. Thus, these agencies, not the City of San Diego, will make the final determination as to the use of Appellant's property.

There can be no doubt that, under these factual circumstances, the California court's holding that Appellant had not shown any unconstitutional burdening of its property by the City of San Diego was correct.

* * *

A. There Can Be No "Taking" Unless the Property Involved Is Left With No Reasonable Use

The common analysis of the "taking" issue apparently stems from Justice Holmes' comments in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 425 (1922), to the effect that:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . ."

See also to the same effect *Agins* v. *City of Tiburon, supra,* 100 S. Ct. at 2141-42 (1980); *Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 121-22; *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958).[22]

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[22] A strong argument can be made that all of these cases and the "taking" analysis they embody stem from a miscomprehension of Justice Holmes' comments. A careful reading of *Pennsylvania Coal,* together with Justice Holmes' earlier opinion in *Block* v. *Hirsch,* 256 U.S. 135, 156 (1921), makes it clear that Justice Holmes was analyzing a "taking" in terms of substantive due process, not in terms of the just compensation clause. Indeed, Justice Holmes later joined the Court's opinion in *Miller* v. *Schoene,* 276 U.S. 272 (1928), which cited with approval *Mugler* v. *Kansas,* 123 U.S. 623 (1887). *Miller* involved a "taking" claim by the owner of cedar trees which had been cut by the State of Virginia in order to prevent the spread of cedar rust to nearby apple orchards. *Mugler* involved a "taking" claim for a brewery the use of which had been prohibited when the Kansas Constitution was amended to include a temperance provision. In both cases, the Court analyzed the "taking" claims under the due process clause, not the just compensation clause and concluded that the regulations involved were constitutional and did not require compensation.

In recent years, a number of lower court decisions and commentators have cited *Miller* and *Mugler* with approval or otherwise followed their analysis in "taking" cases. E.g., *Pamel Corp.* v. *Puerto Rico Highway Authority,* 621 F.2d 33 (1st Cir. 1980); *Fred F. French Investing Co.* v. *City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381; *appeal dismissed,* 429 U.S. 990 (1976); Girard, "Agins: A Step in the Right Direction," 31 Land Use Law and Zoning Digest 3 (1979); F. Bosselman, D. Callies,

The real question, then, is when does a regulatory scheme "go too far?" The rule has developed in this Court and elsewhere that a regulatory scheme pursuant to permissible police power objectives does not amount to a "taking" unless the owner is left with no reasonable use of his property so that the property is made valueless. *Andrus* v. *Allard,* 444 U.S. 51 (1979); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 355 (1908) (Holmes, J.); *Maher* v. *City of New Orleans,* 516 F.2d 1051, 1066 (5th Cir. 1975), *cert. denied,* 426 U.S. 905 (1976). *See also City of Eastlake* v. *Forest City Enterprises, Inc.,* 426 U.S. 668, 674 n.8 (1976) (no "taking" unless property is "render[ed] valueless").[23]

J. Banta, *The Taking Issue* (1973). These courts and commentators have pointed out that a due process analysis, which allows a balancing of the nature of the regulation involved against the burden imposed in determining whether a particular regulation is oppressive or arbitrary, is logically more consistent and leads to more coherent results than a "taking" analysis which focuses on the nature of the impact without considering the strength of the state interest. Although Amici believe that such an approach is in many ways superior to the usual "taking" analysis, as discussed below, Appellant's "taking" claims are insubstantial under any method of analysis.

[23] The principle cited here applies to cases of regulatory mechanisms which do not involve a physical invasion of property. Appellant contends that distinctions between physical seizures or occupations of land and so-called "takings" by overregulation are outmoded and "simplistic." It suggests that there are no analytical differences between the effect of a physical occupation of property by the government and regulation. (App. Br. at 19). But while it may be that a "taking" can occur without the transfer of physical control, *see Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 123 n.25 (1978), this Court has recently noted that "an actual physical invasion" is different for constitutional purposes from a regulatory devaluation of property. *Kaiser Aetna* v. *United States,* 444 U.S. 164, 180 (1979); *see also Andrus* v. *Allard,* 444 U.S. 51, 65 (1979); *Penn Central Transportation Co., supra,* 438 U.S. at 124. It has long been accepted, for example, that governmental occupation of even a small portion of a parcel of

Thus, a prohibition of the most profitable (the so-called "highest and best") use of a property or a diminution in its value as a result of a regulation does not amount to a "taking." For example, in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 384 (1926), this Court sustained as a reasonable exercise of police power not requiring compensation a zoning ordinance which reduced the plaintiff's property value by 75%. In *Hadacheck* v. *Sebastian, supra,* the Court approved a regulation which, without compensation, banned brickyards from a portion of Los Angeles, thus closing down plaintiff's long-existing brick factory and reducing his property's value by over 90%. And, in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 591 (1962), the Court approved an ordinance which prohibited the most beneficial use of the property without compensation. All of these cases were cited with approval in *Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 131. In sum, "[t]he cases are legion that sustained zoning against claims of serious economic damage." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring).

B. Appellant's Property Has Not Been "Taken"

In recent cases the Court has noted that it has had "considerable difficulty" developing any "set formula" to apply the principles discussed above in determining whether an owner has been denied "reasonable use" of his property by a regulation. *See Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 123-24; *see also Kaiser Aetna* v. *United States,* 444 U.S. 164, 174-75 (1979). Instead, the Court has developed several "tests" to be applied in

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real property is a compensable "taking," but a regulation which may have a similar economic effect does not require compensation. *Compare, e.g., United States* v. *Clarke,* 100 S. Ct. 1127 (1980) (construction of road over small portion of property is a "taking") *with Gorieb* v. *Fox,* 274 U.S. 603 (1927) (zoning regulation requiring a setback and thus precluding use of a portion of property does not require compensation).

determining whether a reasonable use remains. *See Penn Central, supra,* 438 U.S. at 124-25, 128. Applying these "tests" makes it plain that the California Court of Appeal was correct in concluding that Appellant has not shown that a "taking" has occurred:

(a) *Economic impact on the owner.*[24] As previously described, the 206 acres of property in the lagoon upon which Appellant's claim is based are part of a contiguous 412-acre tract which Appellant purchased for a single purpose. Amici submit that in order to prove a "taking," Appellant must show the economic impact of the regulations involved over its entire tract, not merely over a portion of its property. As this Court observed in *Penn Central*:

> " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." 438 U.S. at 130-31.

Although in *Penn Central* the Court was referring specifically to air rights as opposed to a portion of a parcel's acreage, the analysis is identical. Indeed, as long ago as *Gorieb* v. *Fox,* 274 U.S. 603, 608 (1927), which sustained a mandatory setback law against a claim that the effect of the law was to take the portion of the property from the street line to the setback, the Court considered the property as a whole in an analysis of the impact of the regulations.[25]

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[24] *See* 438 U.S. at 124.

[25] Similarly, in *Pruneyard Shopping Center* v. *Robins,* 100 S. Ct. 2035 (1980), Justice Rehnquist for the Court noted that deciding a "taking" claim requires analysis of the overall impact of the restriction. The Court there held that entirely depriving an owner of a shopping center of the right to exclude others—"one of the essential sticks in the bundle of property rights"—did not constitute a "taking." It is significant that the first opinion of the

Appellant never attempted to show the impact of the regulations on its entire property.

And in any case, it is quite clear that there is no constitutionally significant economic impact on Appellant from the City's actions. Appellant is not precluded from using its property for the purpose for which it was purchased and has already recovered almost the entire purchase price. Thus, whatever the effect of any preclusion of general industrial development might have been on some other owner, there plainly was no effect on Appellant or, for that matter, even on Appellant's "investment-backed expectations." [26]

Indeed, Amici believe that this case may well not have been pursued this far were it not for the confusion resulting from the suggestion by this Court in *Penn Central, supra,* 438 U.S. at 124, that an owner's "investment-backed expectations" (as opposed to the actual impact of a regulation) are relevant to a "taking" analysis. Amici understand that in *Penn Central* itself this Court explicitly rejected the notion that a "taking" could be shown whenever a regulation limited an owner's ability to exploit a property interest he had believed was available for development. 438 U.S. at 130. Similarly, in *Andrus* v. *Allard, supra,* 444 U.S. at 65-66, this Court noted that "loss of future profits" and other such "investment-backed expectations" is "less compelling than [loss of] other property-related interests" and, hence, not entitled to significant weight.

California Court of Appeal in the instant case antedated this Court's *Penn Central* opinion and therefore did not consider this Court's holding that a "taking" analysis should consider an *entire* parcel, not a pre-selected portion.

[26] A substantial argument can be made that the "investment-backed expectations" of a governmentally regulated public utility such as Appellant are necessarily limited to regulated uses and are therefore significantly different from those of other property owners. This principle has been explicitly recognized in *Bridgeport Hydraulic Co.* v. *Council on Water Company Lands,* 453 F.Supp. 942 (D. Conn. 1978), *aff'd,* 439 U.S. 999 (1978).

The Appellant's argument here is a prime example of how landowners and developers have seized upon the phrase "investment-backed expectations" in an attempt to elevate their speculative investments and ventures to constitutionally protected "vested rights." Thus in its brief Appellant argues that simply because it spent money to buy property for a use allowed under the zoning in effect at the time of acquisition, its "investment-backed expectations" are such that "the government should not be allowed to frustrate those expectancies without paying compensation." (App. Br. at 25). In effect, Appellant argues that its purchase of property gives rise without any further action to a "vested right" to continuation of the property's pre-existing zoning and a "vested right" that the value of its property will go up, not down. *See* J.A. 69, testimony of F.W. Devore, Appellant's Manager of Engineering Land Department.

The truth of the matter is that many decisions from this Court and other courts hold that there is no such thing as a "vested right," whether "investment-backed" or otherwise, in the continuance of a particular zoning classification or even a particular type of land use. Thus, as long ago as *Mugler* v. *Kansas,* 123 U.S. 623 (1887), in rejecting a "taking" claim where an amendment to the Kansas Constitution prohibiting breweries precluded the long-standing use of Appellant's property, this Court observed:

> It is true, that, when the defendants in these cases purchased or erected their breweries [their use was lawful]. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. 123 U.S. at 669.

See also to the same effect *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962) (property owner had no "vested right" in continuing long-standing use of the property as a quarry); *Louisville Bridge Co.* v. *United States,* 242 U.S. 409 (1917) (law authorizing private bridge across Ohio River did not create a "vested right" requiring payment of

compensation under Fifth Amendment when Congress later amended statute to require rebuilding of bridge); *Hadacheck* v. *Sebastian, supra,* 239 U.S. at 410 (brickyard owner had no "vested right" in continued use of property as brickyard).

In every one of those cases, the owner's "investment-backed expectations" were to continue using his property as he had been using it. Obviously Goldblatt did not invest in his quarry, or the Louisville Bridge Company in its bridge, or Hadacheck in his brickyard, or Mugler in his brewery, with the expectation that continued use would be precluded. But as the Court made clear in all those cases, the overall impact of the regulation was not such as to render them unconstitutional. Thus, those decisions paid no attention to "investment-backed expectations."

Indeed, the very nature of zoning and other land use planning is such that it can always be expected that such regulations will not be permanent, but rather will change from time to time. This Court long ago recognized as much in *Village of Euclid* v. *Ambler, supra,* 272 U.S. at 386-87 (1926), when it observed that the changing nature of urban life "will continue to require . . . additional restrictions in respect of the use and occupation of private lands in urban communities." [27]

Of course, Amici recognize that in certain cases a change in a land use regulation may have such a burdensome impact that the change amounts to a "taking," but that is not because of any "vested right" or "investment-backed expectations" but because of the actual impact. Thus, while it is

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[27] *See* generally, 2 Rathkopf, *The Law of Zoning & Planning,* Chapter 57 (6th ed. 1966); 4 Williams, *American Land Planning Law,* Chapter 111 (1975). As stated in *A Model Land Development Code,* the accepted rule is that an "expectation that a development permit could be obtained does not create any rights that prevent change of a development ordinance." American Law Institute, *A Model Land Development Code: Complete Text & Reporter's Commentary,* § 2-309 (2) (1975).

clear in the present case that there is no significant economic impact upon Appellant under any standard, it is equally clear that the occasional use of the term "investment-backed expectations" in this Court's consideration of "taking" questions is not helpful and should be explicitly abandoned.

(b) *A state tribunal's reasonable conclusion that police power objectives of health, safety, morals or general welfare would be promoted by the contemplated regulation.*[28] There can be no doubt on this point. The San Diego ordinances limit the use of the Appellant's lagoon property to the construction of a power plant and other low-density uses. It is beyond dispute that substantial limitations on the usage of property located underwater or in a floodplain are proper. See the discussion in 2 *Williams, American Land Planning Law,* Chapters 38-39 (1975). Indeed, the entire federal flood insurance program in this country is based on the notion that high-density residential and industrial uses should be avoided in floodplains.[29] And this Court has already held that the State of California's "open space" legislation is legitimate. *Agins* v. *City of Tiburon, supra,* 100 S. Ct. at 2141-42.

(c) *Character of the governmental action.*[30] Appellant characterizes the action of the City of San Diego as "extinguish[ing] a fundamental attribute of ownership," the supposed "right to develop," on the theory that "extinguishing" one attribute of ownership amounts to a "taking." (App. Br. at 24). But as this Court made clear in *Pruneyard Shopping Center* v. *Robins,* 100 S. Ct. 2035 (1980), it is the overall impact, not the "extinguishing" of some portion of ownership rights, which must be examined. Thus, in *Pruneyard* the state had totally "extin-

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[28] *See* 438 U.S. at 125.

[29] 42 U.S.C. §§ 4001(e) *et seq. See also Texas Landowners Rights Ass'n* v. *Director, FEMA,* 453 F. Supp. 1025 (D.D.C. 1978), *aff'd mem.,* 598 F.2d 311 (D.C. Cir.), *cert. denied,* 100 S. Ct. 267 (1979).

[30] *See* 438 U.S. at 124, 128.

guished" the owner's right to exclude leafletters from its property, but this Court found no "taking."

Actually, in this portion of the argument Appellant is seeking to bring itself into line with cases such as *Kaiser Aetna* v. *United States, supra,* where the government was physically invading the private property involved.[31] No such thing has taken place in the present case. The City of San Diego has not turned the Appellant's property into a park; it has not required public access; it has not precluded the Appellant from building its power plant on the property. It has passed what is neither more nor less than a zoning regulation which has taken due account of the nature of the property involved and the Appellant's intended use.

* * *

Finally, it is worth noting that this case is similar in significant respects to *Agins* v. *City of Tiburon, supra.* There, as here, the "open space" plan and zoning on its face allowed the owners to develop the property as they claimed was desired. There, as here, the owners made no attempt to actually develop the property—they never sought a building permit, never submitted any plans. This Court in *Agins* concluded that the owners were, therefore, in no position to attack the zoning as applied. 100 S. Ct. at 2142. The same result is required here.[32]

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[31] In *Kaiser Aetna,* this Court held the government's attempt to require the property owner to allow public access to its private pond to be a "taking." *But see Pruneyard Shopping Center* v. *Robins, supra.*

[32] Appellant argues at length that the trial court and the Court of Appeal in its first opinion concluded that exhaustion of administrative remedies was unnecessary and that, therefore, failure to exhaust its administrative remedies is not an adequate state ground of decision. (App. Br. at 30-35). This argument overlooks several important facts. First, the original Court of Appeal opinion has "become a nullity and [is] of no force or effect" because of subsequent actions by the California Supreme Court. *Knouse* v. *Nimocks,* 8 Cal.2d 482, 66 P.2d 438 (1937). *See People* v. *Woods,* 19 Cal. App. 556, 65 P.2d 940 (1937). Second, the Court of Appeal in its

CONCLUSION

Amici submit that Appellant has fallen far short of showing a constitutional violation. Indeed, Amici believe that it is evident that, on the present record, Appellant raises no colorable "taking" claim.[33] Amici believe, therefore, that the holding of the California Court of Appeal is correct and should be affirmed.

Respectfully submitted,

DAVID BONDERMAN
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

CHRISTOPHER J. DUERKSEN
THE CONSERVATION FOUNDATION
1717 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae

Of Counsel:

MICHAEL MANTELL
Washington, D.C.

ANTONIO ROSSMANN
San Francisco, Calif.

October 1980

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later opinion overturned both the trial court's and its first opinion, which is also of no further effect. Third, the argument is based on the mistaken premise that the zoning and "open space" plan preclude all industrial uses when, as discussed previously, they do not preclude a power plant. Fourth, the point is not whether failure to exhaust is an adequate state ground. Rather, as this Court held in *Agins*, a property owner cannot claim a "taking" under the U.S. Constitution unless, at a minimum, he has been damaged in fact. Where the ordinance involved on its face allows appropriate uses, there can be no such damage in the absence of a frustrated attempt at development.

[33] In the event that this Court does reach the remedy issue, Amici submit that, as the California courts have concluded, no damage remedy is appropriate. Amici fully support the position on this issue set forth by Amici Curiae National Trust for Historic Preservation, *et al.* in their brief.

APPENDIX

APPENDIX A

The interests of Amici are as follows:

1. The Conservation Foundation is a nonprofit research and communications organization based in Washington, D.C. The Foundation's primary purposes are to improve the quality of the environment and to promote wise use of the Earth's resources. Since its founding in 1948, The Conservation Foundation has worked extensively in the fields of land use planning, urban conservation, coastal resources protection and public land management.

2. Don't Tear It Down is a nonprofit membership organization in Washington, D.C. dedicated to preserving those features of the built environment which have made the capital one of the most beautiful urban areas in the world and a pleasant city in which to live and work. Don't Tear It Down has played a central role in preserving and revitalizing the Old Post Office, the Willard Hotel, Lansburgh's, and other well-known Washington landmarks, and in encouraging continued use and adaptive reuse of older buildings and structures.

3. The National Audubon Society ("NAS") is a nationwide membership organization with 439 chapters and 400,000 members. NAS' goals include working for policies that encourage environmentally and economically sound land and water resource planning at the national, state, and local levels and promoting environmentally sensitive development and rehabilitation in our cities.

4. The National Center for Preservation Law was incorporated in 1978 under the laws of the State of New York as a nonprofit organization devoted to architectural, historic, and neighborhood conservation. The Center maintains offices in New York and Washington and devotes its resources to advising and providing legal services for interested state, local and private agencies and groups with respect to conservation of historic resources.

5. The National Conference of State Historic Preservation Officers is a nonprofit organization which facilitates the administration of state and federal programs for the preservation of America's historic, architectural and cultural heritage. The National Conference membership consists of the officially designated State Historic Preservation Officer in each of the 50 states, the District of Columbia and five territories. Among the responsibilities of these officers are the compilation of statewide surveys of historic resources; nominations of inventoried properties to the National Register of Historic Places; and the administration of the National Historic Preservation Act grants-in-aid program.

6. The Sierra Club is a nonprofit membership organization which has been extensively involved at both local and national levels in matters pertaining to land use. The Sierra Club, through its nearly 200,000 members, has a long-standing interest in ensuring that zoning regulation is an instrument of rational land use planning sensitive to evironmental concerns.

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JOHN H. LARSON
County Counsel

TERRY C. SMITH
Division Chief,
Real Property Division

PAUL T. HANSON
Deputy County Counsel

648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1822

Attorneys for Amicus Curiae,
County of Los Angeles

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PAUL T. HANSON
Deputy County Counsel

648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1822

Attorneys for Amicus Curiae,
County of Los Angeles

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I

INTEREST OF AMICUS

Pursuant to Supreme Court Rules, Rule 36(4), the Los Angeles County Counsel submits this brief in support of the appellee, the City of San Diego.

The County of Los Angeles is the largest local governmental entity in California. The County is charged with land-use planning and zoning responsibility for an immense and varied area in which inadequate land-use planning could prove disastrous to persons and property. The area, approximately 4,000 square miles, is twice the size of Israel and contains nearly as many people as the state of New Jersey.

The County of Los Angeles is presently engaged in the immense, legislatively-mandated project of drafting a general plan. This plan is required by law to include an open-space-land element; zoning ordinances and other land-use control activities must conform with the open-space element of the general plan. See West's California Government Code, Sections 65100, 65101, 65560, 65561, 65562, 65566, 65567 (and Supp. 1980).

The exposure of County economic resources to judgments for compensatory damages under a theory of inverse condemnation for the taking of private property by zoning activities creates an intolerable situation.

Los Angeles County planners and the local elected officials, the Board of Supervisors, believe that the rights of property owners are adequately safeguarded by the equitable remedies described in Agins v. Tiburon, 24 Cal.3d 266, 273, 157 Cal.Rptr. 372, 375 (1979), affd. ___ U.S. ___, 65 L.Ed.2d 106 (1980).

The County of Los Angeles is a glaring and painful example of why local land-use planners

and regulators should not be restrained and intimidated by the threat of judgments for compensatory damages under a theory of inverse condemnation.

Every Winter our remote, coastal areas suffer severe tidal erosion, damaging streets and homes.

Every Spring there are floods, flash floods, and slides of earth and mud, destroying lives and improvements, public and private.

Every Fall our dramatic canyon and foothill fires amaze the nation on T.V. while destroying homes, wildlife, people, and ground cover, setting the stage for the Spring slides, and fouling the already questionable air supply.

The immediate human suffering and the destruction of expensive public and private improvements are not the only social evils caused by the fact that in the past development was allowed where it should clearly not have been.

The amount of public money, federal, state, and local, spent because of these annual disasters since 1950 to protect and assist the very small percentage of the County population which lives in these unstable areas is a scandal, if the relatively small number of people benefited by the public expenditures is considered.

This annual public expense which could be spent to benefit the vast majority of County citizens who live in the stable, more-developed areas of

the County, is a direct result of the laissez-faire attitude which dominated our land-use planning from at least the end of World War II to about the late-Sixties, early-Seventies.

This is to point out that land-use planning and regulation are serious social business. Timid or overly-permissive land-use planners risk the lives, the property, the general health, and the dwindling economic resources of the people.

Land-use planning/regulation is not a game devised by "trendy" beaurocrats and public officials to torment land developers.

Every year in Los Angeles County people die, homes and improvements are destroyed, and vast amounts of public money are spent ineffectively because development was allowed where it should not have been at all or because too-intense development was allowed in light of well-known hazards.

There are, of course, many, more, less dramatic social problems which flow from unwise development of land.

It is believed by many in Los Angeles County that, in the past, land-use planning and regulation officials have been too permissive toward large land developers.

It is also believed that the primary goal of most developers of large tracts of raw land is not to develop their land so that the interests of society are best served but to develop land so that the return on their investments will be maximized or that

their own interests will be best served. This is their right under our system and the Constitution.

But, anyone who believes that "market forces" should be the primary form of regulation of urbanization and land development should closely examine the present condition of Southern California, which until very recently was the most famous example in the Nation of that type of land-use regulation and planning.

As far as urbanization and development of Southern California is concerned, Adam Smith's "invisible hand," working through "market forces," has been "all-thumbs."

The pressure which a large land owner/ developer can bring on local planning officials, especially of small cities or underpopulated counties, is immense, even without the threat of damages in inverse condemnation.

Should small, residential cities and underpopulated counties have to pay huge, artificial and unjust damage awards, in inverse condemnation, without even getting title to the land, as the price of trying to prevent unreasonable or hazardous development of land within their jurisdiction? Equity seems to be the better solution.

Equitable relief is a fair and adequate remedy when regulation of land use constitutes a taking without compensation under the California and federal constitutions. It is fair to the developer and fair to the citizens of the local entity.

Equitable actions are by far the means of resolving such disputes most favored by tradition.

Damages on a theory of inverse condemnation are a harsh, unreasonable, and unfair remedy.

Such damages are a severe penalty against the City or County for trying only to reasonably regulate development within its jurisdiction.

Such damages create a windfall for the property owner who retains title to the land and who then may wait for the environmental, economic, social, or political situation to change and then reapply for the same or modified development permissions or changes of use-regulation. While awaiting a more favorable climate for use of the land he holds it for speculation. Or, he may sell the unburdened fee to someone else to hold for speculation in the always reasonable expectation that change is likely and with the knowledge that pendulums always swing in two directions.

Under the Bill of Rights, the trial and appellate judges hearing these disputes must vigorously protect the rights of the individual property owner from the attempted use of the police power, to regulate land-use, as a substitute for the power of eminent domain and the payment of just compensation.

However, it is intolerable, under the separation-of-powers doctrine, that any judge should rule that there has been a taking without compensation by zoning or planning when the property owner (as in the case at bar) has not even formally

brought the problem to the attention of the local executive and legislative officials by asking for a development permit, a change of zone, or a variance. J.A. 66, 114.

This Court should not find that there has been a taking in the case at bar because this property owner contemptuously refused to ask for development permits, variance, or change of zone, and the trial court violated the separation-of-powers doctrine in finding a taking by zoning or planning in such a case.

Compensatory damages under a theory of inverse condemnation should not be allowed for land-use planning or regulation because the threat of such judgments will intimidate economically hard-pressed local governments and make officials reluctant to prohibit or restrict development of land.

This Court should not find a taking in the case at bar and should uphold the California rule stated in Agins v. Tiburon, 24 Cal. 3d 266, 273, 157 Cal. Rptr. 372, 375, affd. ___ U.S. ___, 65 L. Ed. 2d 106 (1980), that only traditional equitable relief is available when a land owner alleges uncompensated taking or damaging by land-use regulation or planning.

The basic question in this appeal is: who ultimately makes the hard decisions about urbanization and development; the land developers, "market forces," or local elected officials?

If the power of land-use regulation and planning truly resides with local elected officials, applying various enactments of the legislators, with clarification and guidance by the trial and appellate judges, then there is simply no need for damages in these cases. Equitable relief, the only remedy ever recognized by this Court in such cases, is enough to satisfy the Fifth and Fourteenth Amendments.

II

STATEMENT OF THE CASE

Attorneys for Amicus, County of Los Angeles, want to specially emphasize the following facts of this case:

1.) The appellant, property owner, has not made an application to use or to improve the subject property nor has it asked the city what development would be permitted. J.A. 66, 114.

2.) Property owner does not allege that it has requested a variance or change of zone, nor does the record reflect that this is the case. J.A. 4-34.

3.) The subject judgment in inverse condemnation, based on a theory of a taking, does not pass title to the fee of the subject property or to any described easement in the subject property to the City of San Diego on payment of the award. J.A. 44-47.

III

SUMMARY OF THE ARGUMENT

No case of this Court or of California or of any other jurisdiction has held that mere planning activities of local government for land use, as opposed to zoning activities, may constitute a taking without compensation.

No case has ever held that rejection of a bond issue to acquire property for public purpose, by the voters, for open space, may constitute a taking without compensation.

Since harsh or unreasonable or discriminatory classification of a parcel in a zoning ordinance may be a ground for variance or change of zone, there should be no finding of taking without compensation by zoning ordinance unless the property owner has sought relief from the zoning classification of his property through the zoning process.

The Fourteenth Amendment does not require that all states provide the same means of protecting the federally guaranteed constitutional rights of citizens. The amendment requires only that the judicial and legislative acts of each state adequately protect and vindicate constitutional rights of citizens.

Under the law of California, equitable relief, as described by the California Supreme Court in its Agins decision, is adequate protection of the federal constitutional right to be free from

unconstitutional zoning acts of local governments. If a zoning ordinance would work a taking without compensation as to a parcel of land, the ordinance must be declared void as to the property or a variance or change of zone, if denied by the zoning authority, must be mandated by the trial judge.

Equitable relief is the traditional method for landowners to protect themselves from abuse of the police power to regulate land by zoning.

Equitable relief will not be an adequate judicial remedy unless the property owner is required, before he can allege an uncompensated taking, to first seek development permission, variance, or change of zone, for a specific development project, because the equity power balances rights, hardship, and interests, and unless a specific development plan has been proposed by the owner and rejected by the zoning entity, there is nothing to be balanced against, say, the property interests of complaining neighbors.

Compensatory damages under a theory of inverse condemnation are a harsh, unreasonable, and unfair remedy from the standpoint of the citizens of a defendant, local governmental entity.

There is no vested property right in existing zoning of a parcel.

IV

THE ARGUMENT

1. The Planning Activities.

In this case three basic activities of the City are alleged to give rise to a taking without compensation: the designation of some of the subject property as open space on the general plan of the City; unsuccessful attempts to have the open-space bond issue, which could have led to acquisition of part of the subject by eminent domain, ratified by the voters; down zoning of a portion of the subject property from M-1-A to A-1-10. J.A. 36-42.

It is obvious from the findings of the trial judge that he attributed the greatest weight to the designation of some of the property as open space on the City's general plan. J.A. 41.

All local governmental entities in California must enact open-space plans. West's California Government Code §65300, 65302, subd. a (and Supp. 1980).

The City of San Diego as a charter city is not required by statute to render its zoning ordinances consistent with its open-space plan, nor to allow only development consistent with its open-space plan. West's California Government Code, §§65700, 65803 (and Supp. 1980).

In any event, no application for clarification of the plan, variance or change of zone, or permission to develop was ever submitted by the owner.

Planning is not the same as zoning. Zoning, rather than planning, controls the use of a parcel of land. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); see also Hagman, Urban Planning and Land Development Control Law (1971) pp. 53-54.

In general, zoning should be consistent with a plan and the plan should not be amended constantly to allow zoning changes. Dalton v. Honolulu, 462 P.2d 199, 205-09 (Hawaii, 1969).

The plan is analogous to a constitution as the zoning ordinance is analogous to a statute. See Wright and Webber, Land Use in a Nutshell (1978), p. 50.

No known case has held that planning per se, as opposed to the actual zoning regulation, which may be based on a plan, may constitute an uncompensated taking of property for public use.

Because to allow inverse condemnation damages for planning could have a negative effect on the planning process, which is generally considered to be socially beneficial, the California Supreme Court has ruled that mere planning may not constitute a taking. Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110, 120-21, 128, 109 Cal.Rptr. 799, 805-06, 810 (1973).

2. The Failure Of the Voters to Ratify the Issue Of Bonds to Finance Acquisition Of the Subject Property.

No known case has ever held that a failed attempt at a bond issue to acquire a parcel can amount to a taking of that parcel.

It is hard to see how any damage could flow from such an election because the results rejecting acquisition would be well-publicized.

3. The Failure Of the Complaint to Allege and the Trial Court to Find, That the Owner Had Sought Development Permits, Variance, Or Change Of Zone, Is Fatally Defective to a Finding Of a Taking Without Compensation.

It is admitted that the property owner herein failed to do any of the following things:

1.) It did not seek clarification from the planning and zoning entity of what type of development would be allowed on the subject property. J.A. 66.

2.) It did not seek permission to grade, to build, or to develop the property in any way. J.A. 66, 114.

3.) It did not seek a variance or a change of zone. J.A. 4-34.

This Court has very recently spoken on this issue in Agins v. Tiburon, ___ U.S. ___, 65 L.Ed. 2d 106, 112 (1980), when it said:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . , or denies an owner economically viable use of his land. . . . Id., 65 L. Ed.2d at 112 (citations omitted, emphasis added).

In Agins this Court ruled that planning and zoning for the preservation of open space substantially advances a legitimate state interest. Agins v. Tiburon, supra, 65 L.Ed.2d at 112. So, the questions are whether the ordinance has been applied and, if so, whether the owner has been denied economically viable use of his land.

This Court has generally required that a specific proposal for development or use of the owner be considered by the entity. See e.g., Nectow v. City of Cambridge, 277 U.S. 183, 186 (1927) (application for permit to build contrary to the zoning).

It is very difficult to determine whether the owner has been denied economically viable use of this land when no proposed development has been put forward by the owner and rejected by the City, either by denial of permits to build or by rejection

of a request for variance or change of zone.

If an ordinance seems harsh toward the owner on its face, but if a variance or change of zone is "his for asking," surely there could be no taking.

It is very difficult in this case to believe the owner has lost all use because the City seems to be saying in the ordinances that the highest and best use, an industrial park with buffer areas, would be allowed. J.A. 38-41.

In the case at bar, the zoning ordinance in question, mostly industrial with some agricultural, has clearly not been applied to the subject property because the owner has not sought a permit to build an industrial park on its M-1-A land, which the trial court found as the parcel's highest and best use. See J.A. 39, 40, and 41.

The agricultural zonings, A-1-10 and A-1-1, have not been applied to the subject parcel because the owner has not requested a variance or a change of zone based on "submittion of a specific plan of development." J.A. 39-41.

Apparently the city planners have indicated that a substantial portion of the agriculturally zoned part of the parcel could be used for industrial development on the submission of a specific plan for development. J.A. 39, 40.

The trial court obviously believed that the designation of some of the property as open space, on the general plan, would control over the actual

zonings of M-1-A and A-1-1 (with possible use as industrial on submission of a specific plan for development) of the zoning ordinance.

The Trial Court deemed that, in spite of the state statute which excused charter cities, like San Diego, from the requirement of consistency between general plan and zoning ordinance (West's California Government Code, §§65700, 65803 (Supp. 1980)), the open-space designation on the general plan was, in effect, a zoning ordinance.

However, even viewed as a zoning ordinance the open-space designation has not been applied to the subject property until a variance or change request by the owner has been denied, or until a specific plan for development has been disapproved on the grounds that it is not allowed under the open-space designation.

The City, even if it wanted to, has been given no legal opportunity to resolve this alleged harsh and unreasonable zoning of the subject property because no specific plan for development has been proposed for which a variance or change of zone could be granted.

Because the interests of the public, especially neighbors, must be given great weight by the entity in any zoning case, the request to develop or for a change of zone or variance must come from the owner. Otherwise, why should the city risk injuring neighbors by granting a variance which the owner doesn't want?

And, again, in the case at bar, the city maintains that it would honor the present industrial and agricultural (with possible change to industrial for a specific plan) zoning, if development were sought.

To a large county such as Los Angeles this prerequisite that a zoning ordinance be applied to property before a taking can be found is very important because, until there is a specific request for variance or change of zone, based on a specific project or a request for a permit to develop, the county planners might not even be aware of the problem.

Some zones might be hundreds of miles in area.

Furthermore, due process requires that all changes of zone or variance be granted only after noticed hearing which are frequently attended by concerned neighbors. Unless a specific plan of development is proposed by the owner the zoning authority is being asked to make a decision with insufficient data.

This ordinance and this open-space plan have not been applied to this property. This trial judge was acting contrary to the separation-of-powers doctrine in finding a taking without compensation. He denied local legislative and executive officials their right to correct any alleged unfairness to the owner.

4. The Fourteenth Amendment Only Requires That Rights Under the Federal Constitution Be Adequately Protected By State Statutory Or Case Law.

This Court expressly refrained from passing, at the end of its Agins opinion, on whether the states may limit persons, whose land has been taken without just compensation by land-use regulation to equitable relief. Agins v. Tiburon, supra, 65 L.Ed. 2d at 114.

The equitable remedies allowed under California law are described in Agins v. Tiburon, 24 Cal.3d 266, 273, 157 Cal.Rptr. 372, 375 (1979) (hereafter "California Agins").

The acts and decisions of the California Supreme Court are "state action" and the taking clause of Fifth Amendment applies to the states through the due process clause of the Fourteenth Amendment. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1963); Chicago, B. and Q. Ry. Co. v. Chicago, 166 U.S. 226, 234-41 (1897).

The settled rule in Fourteenth Amendment questions is that state judicial action need not provide specific legal means of vindicating constitutional rights as long as the remedy provided is adequate. A state's judiciary may even substantially change the means of vindicating the rights as long as an adequate remedy is substituted.

A state is not required by the Fourteenth Amendment to permit a damage action, or any specific form of action for the vindication of constitutionally protected rights as long as the available remedy is adequate to protect rights guaranteed by the Constitution. Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933); Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 159-60 (1931); Iowa Central Ry. Co. v. State of Iowa, 160 U.S. 389, 393 (1896); Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1902).

This principle applies to the appellate courts of a state as well as to the state legislature. American Railway Express v. Kentucky, 273 U.S. 269, 274 (1927).

The federal constitutional question under the Fourteenth Amendment is whether the state remedy desribed in California Agins is adequate to vindicate and protect property rights under the taking clause.

If California equitable relief is adequate to protect land owners' rights under the taking clause of the Fifth Amendment then the California Supreme Court should be affirmed on this point.

This Court has never held that compensatory damages under a theory of inverse condemnation must be allowed by state law under the Fourteenth Amendment when land-use regulation constitutes an uncompensated taking for a public purpose.

The leading cases of this Court on taking by land-use regulation involve equitable relief rather

than money damages under a theory of inverse condemnation. See e.g., Nectow v. City of Cambridge, 277 U.S. 183 (1927).

It is important to remember that no remedy was taken away from property owners by the California Agins decision. The decision only affirmed the status quo of no inverse damages for zoning.

The California Supreme Court has never held that zoning activities, which constitute a taking of property without just compensation, give rise to a cause of action for money damages under a theory of inverse condemnation. In H.F.H., Ltd. v. Superior Court, 15 Cal.3d 508, 518 note 16, 125 Cal.Rptr. 365 (1975), the court expressly refused to rule on the question.

California courts have never allowed money damages on an inverse condemnation theory in a true zoning case except for Eldridge v. Palo Alto, 57 Cal. App.3d 613, 129 Cal.Rptr. 575 (1976), an intermediate-level appellate decision, which was expressly overruled on this point by the California Supreme Court in Agins v. Tiburon, supra, 23 Cal.3d 266, 273.

All earlier zoning/taking cases, in which damages for inverse condemnation were allowed involved factual situations distinctly different and easily distinguishable from the facts pleaded in Eldridge or Agins. See extensive analysis of all early zoning/taking/inverse cases in California, H.F.H., Ltd. v. Superior Court, supra, 15 Cal.3d at 513-18 and notes 4 through 14.

It can be strongly argued that Eldridge is based on serious misinterpretation of the very cases discussed by the H.F.H., Ltd. court. See Hall, Eldridge v. City of Palo Alto; Aberration or New Direction in Land Use Law?, 28 Hastings L.J. 1569, 1584-91 (1977).

5. California Equitable Relief Is Adequate to Protect Fifth Amendment Rights Under the Fourteenth Amendment.

The California Supreme Court in California Agins has not limited the right of land owners to be free from uncompensated takings.

The California Court has merely said that if a local zoning ordinance would constitute a non-compensated taking, under the applicable tests, it is void: the property owner's property rights are vindicated by a declaration of voidness and/or by mandate. Agins v. Tiburon, supra, 23 Cal. 3d at 273; see also MacLeod v. Los Altos, 182 Cal. App. 2d 364, 369-70, 6 Cal. Rptr. 328 (1960).

Obviously, the greatest protection of rights available to the property owner, which is described in Agins, is that a zoning ordinance which violates the taking clause is subject to invalidation. No valid zoning ordinance can also be an uncompensated taking. Eldridge v. Palo Alto, 57 Cal. App. 3d 613, 621, 129 Cal. Rptr. 575 (1976), which held otherwise was expressly overruled in Agins. Agins v. Tiburon, supra, 23 Cal. 3d 273.

In practical terms, the equitable enforcement and protection of the constitutional right to be free of zoning which violates the taking clause is an effective remedy under our state law and procedure for the following reasons:

1. Priority of Trial Setting and Speedy Resolution: The action for declaratory relief is specifically entitled to priority in setting for trial. West's California Code of Civil Procedure, §1062a. Mandamus, either administrative or traditional, West's California Code of Civil Procedure, §§1084 to 1094.5, 1107-08, is a special proceeding and trial may be had and the writ issued or denied very quickly. The alternative writ, which must issue within five days, includes the date for the hearing on the merits. West's California Code of Civil Procedure, §§1088, 1107.

2. The action for declaratory relief is well-established in California as a means to void a zoning ordinance which is unconstitutional or unconstitutional as applied. Skalko v. City of Sunnyvale, 14 Cal.2d 213, 216, 93 Pac.2d 93 (1939).

3. The traditional writ of mandate is long-established in California as a means of challenging unconstitutional zoning and zoning actions. Roman Catholic Welfare Corp. v. Piedmont, 45 Cal. 2d 325, 334, 289 Pac.2d 438 (1955); Reynolds v. Barrett, 12 Cal.2d 244, 249-52, 83 Pac.2d 29 (1938); Floresta, Inc. v. San Leandro, 190 Cal. App.2d 599, 612, 12 Cal.Rptr. 182 (1961).

4. Administrative mandate is also an effective remedy. If the challenged ordinance

provides for administrative hearing and appeals, as most do, then traditional or ordinary mandamus is not the proper remedy; rather, the proper remedy is administrative mandate. West's California Code of Civil Procedure, §1094.5; see also Selby v. San Buenaventura, 10 Cal.3d 110, 128, 109 Cal.Rptr. 799 (1973).

5. The enforcement of an unconstitutional zoning ordinance may be enjoined. MacLeod v. Los Altos, 182 Cal.App.2d 364, 369-70, 6 Cal.Rptr. 326 (1960); McCaslin v. Monterey Park, 163 Cal. App.2d 339, 346-48, 329 Pac.2d 522 (1958).

Under California law a landowner who challenges zoning must pursue administrative remedies before seeking judicial relief. Failure to so plead is grounds for a general demurrer. Igna v. City of Baldwin Park, 9 Cal.App.3d 909, 914, 88 Cal.Rptr. 581 (1970).

This is clearly a good rule for purposes of judicial economy, especially when the relief sought is equitable.

The failure of the trial court to find that the property owner has done this (J.A. 35-42) violates the above rule and the doctrine of separation of powers. This omission of both the complaint and the findings is an adequate reason for this Court to find that there had been no sufficient allegation or proof of a taking herein.

6. Inverse Condemnation Damages Would Be a Harsh and Unfair Remedy.

Appellant's position would require the local governmental entity to pay severe damages for merely enacting in good faith a general plan, or zoning ordinance, which the property owner need not even seek to have clarified or modified.

The entity in the case at bar after paying compensation does not even have a recordable judgment giving it an interest in the land, neither a fee, nor a described easement, nor even a recordable metes-and-bounds description of the land actually taken. J.A. 44-47.

California is not alone among the states in holding that the owner's remedy, if zoning or other legislative action would constitute a taking of property, is equitable relief rather than damages under an inverse theory. See Davis v. Pima County, 590 P.2d 549, 461 (Arizona App. 1978); Mountain Medical, Inc. v. Colorado Springs, 608 P.2d 821, 823-24 (Colorado App. 1979).

The equitable remedy would seem to be far less drastic and also protective of the land owner's rights. There is no indication in California case law that equitable relief is inadequate to protect property rights.

7. No Vested Property Right In Existing Zoning.

The fact that the owner herein failed to seek permission to develop the property as an industrial park with variances or changes or zone, as necessary, is convincing evidence that what it has suffered is not a taking but a mere decline in market value based on uncertainty as to possible use. It is not even clear from the record that this "down zoning" of the land has actually occurred.

It is well-established in American property law that a landowner has no vested right in existing zoning of a parcel until he obtains a building permit and substantially starts construction. Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal.3d 785, 791, 132 Cal.Rptr. 386 (1976) (Cert. den. 429 U.S. 1083, 51 L.Ed.2d 529); Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal.App.2d 776, 782-98, 194 Pac.2d 148 (1948).

Substantial diminution of value caused by down-zoning is not a taking under the Fifth Amendment. Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 131 (1978).

Until the property right to zoning has vested in the owner, there is no "property" in the zoning to "take."

It is very difficult to fairly determine if the owner herein has really been denied "economically viable use of his land" when no proposed use

whatever has been put forward or denied because of land-use regulation. Agins v. Tiburon, supra, 65 L.Ed.2d at 112.

All that has really happened to this owner is that the market value of his property may have temporarily declined because of land-use uncertainty which he has done nothing whatever to clarify or resolve.

V

CONCLUSION

This Court is requested to affirm the decision of the California Court of Appeals or, in the alternative, to find that it does not have jurisdiction, because California equitable relief is adequate under the Fourteenth Amendment to protect the Fifth Amendment rights of property owners.

Respectfully submitted,

JOHN H. LARSON
County Counsel

TERRY C. SMITH
Division Chief,
Real Paroperty Division

PAUL T. HANSON
Deputy County Counsel

Attorneys for Amicus Curiae
County of Los Angeles

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No. 79-678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

SAN DIEGO GAS & ELECTRIC COMPANY, *Appellant*

v.

CITY OF SAN DIEGO, et al., *Appellees*

On Appeal From The Supreme Court of California

NATIONAL ASSOCIATION OF HOME BUILDERS AND CALIFORNIA BUILDING INDUSTRY ASSOCIATION BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT

GUS BAUMAN
National Housing Center
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 452-0232
Counsel for Amici

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QUESTION PRESENTED

Whether a state court can rule out the right of property owners to file compensatory taking, or inverse condemnation, actions in direct contravention of the United States Constitution and Supreme Court rulings thereunder.

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No. 79-678

IN THE

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OCTOBER TERM, 1979

SAN DIEGO GAS & ELECTRIC COMPANY, *Appellant*

v.

CITY OF SAN DIEGO, et al., *Appellees*

On Appeal From The Supreme Court of California

NATIONAL ASSOCIATION OF HOME BUILDERS AND CALIFORNIA BUILDING INDUSTRY ASSOCIATION BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT

Amici have received the parties' written consent to file this brief and have filed the letters of consent with the Clerk of the Court.

INTEREST OF AMICI

The National Association of Home Builders represents approximately 122,000 builder and associate members organized in 768 affiliated state and local associations in the fifty states, District of Columbia, and Puerto Rico. Its members include not only people

and companies that construct and supply single-family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. The affiliated California Building Industry Association, composed of six regional and twenty local associations, has approximately 5,000 members that produce about seventy percent of the state's housing. We are the voice of the American and California shelter industry.

The Associations have a fervent interest in a just and fair approach to government use of private land, until now protected ultimately by the Constitution. Intertwined with this interest is the Associations' active involvement in trying to control the causes of skyrocketing housing costs. The impacts on our home buying and renting public and on the Associations' membership have been devastating. Throughout the past decade, an increasing percentage of low and moderate income families have been priced out of the housing market.

A major cause of this disturbing phenomenon has been the growing enactments of unduly restrictive zoning and land use controls by many shortsighted local governments. If the decision of the court below is not reversed, the practical capability of successfully challenging otherwise unconstitutional land use policies will greatly diminish, thereby accelerating the growth of exclusionary practices and further impeding the ability of this industry to assist the nation in meeting its critical housing needs.

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part: ". . . nor shall private

property be taken for public use, without just compensation."

The fourteenth amendment to the Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

SUMMARY OF ARGUMENT

The straightforward language of the Constitution, supported by relevant caselaw, noted land use commentators, and the public policy considerations outlined below, makes plain that when public control of private property goes so far as to result in a taking, just compensation may be the only appropriate remedy. The just compensation clause, like the due process and equal protection clauses, is grounded in the equity concept of doing what is fundamentally fair under the circumstances of each case. Such a concept precludes the utterly inflexible remedy rule recently created by the lower court and now applied to cases, such as this one, in which a taking has been found to occur.

Speaking clearly to the substance and effect of government actions, the fifth amendment does not pose the taking question in simplistic terms of "police power" versus "eminent domain power" exercise. Hence remedy cannot be determined by the mere form that government uses to label an action but must be addressed on a case-by-case review of the facts. The lower court's *per se* rule, however, destroys any chance of balancing public gain with private loss and is an artlessly singular way of resolving complex land use issues.

Not every harsh regulation is necessarily compensable; but neither can every taking be necessarily uncompensable. At the very least, the right to file an inverse condemnation action for damages surely lies in those few cases in which harsh regulation is alleged to be so onerous as to result in the denial of *all* use of one's property. And it is precisely that acquisitive allegation that was proven in this case by the evidence and was sustained by both trial and appellate courts below. The compensation remedy is especially desirable, and necessary, in those spare instances in which government action, though so severe as to effect a taking, is nonetheless socially necessary.

Further, in these times of more complex and multivaried governmental actions combining to affect land use, just compensation can not only repair an individual's loss but also pierce the veil of a community's exclusionary or excessively arbitrary land use policies. Heavy-handed regulatory conduct, even if struck down as unconstitutional or invalid, all too often reappears in a different guise to accomplish the same restrictive results, namely artificially-increased land and housing costs. A damages remedy lessens the likelihood that a community will continue to play freely with the constitutional rights of its citizenry, be they property owners or housing consumers.

For this appeal, at bottom, is about substance over form, equity over legalism, the recognized need for the remedy to fit the wrong, and the right to meaningful judicial access to seek appropriate redress for unmistakable constitutional harm.

ARGUMENT

I. The Decision of the Court Below Effectively Destroys the Right To Make a Compensatory De Facto Taking Claim Despite the Just Compensation Clause and Rulings of This Court and Thus Denies a Needed Remedy for Controlling Unconstitutionally Aggravated Housing Costs.

This appeal's *raison d'être* is *Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979) (*Agins I*). In a sweeping and unprecedented policy decision that went far beyond the circumstances of that particular case, the court in *Agins I* declared that henceforth no one, regardless of the facts, may bring a claim under the United States and California Constitutions for inverse condemnation damages, that is, allege a de facto taking of private property by police power action without just compensation.

This Court, recognizing the dichotomous holdings of *Agins I,* affirmed the holding that no taking had occurred in that case, but did "not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." 100 S. Ct. 2138, 2143 (1980) (*Agins II*). The full sweep of *Agins I* is now revealed here, for its *per se* remedy rule was applied blindingly to a case which, unlike *Agins,* had a full trial and a finding of a taking and an awarding of damages. *San Diego Gas & Electric Co.* v. *City of San Diego,*[1] 81 Cal. App. 3d 844, 146

[1] A unanimous appellate panel affirmed, in a classically-reasoned taking opinion, that based on trial evidence (E), certain zoning (Z) and planning (P) restrictions, together with an acquisition resolution (A), combined to equal a denial of all use of complainant's land (D), therefore resulting in an unconstitutional taking of property without just compensation (T) and requiring, in this circumstance, a remedy in inverse condemnation (IC). Or,

Cal. Rptr. 103 (1978), retransferred by Cal. Sup. Ct. to 4th D.C.A. and redetermined in light of *Agins I*, June 26, 1979, hearing denied, Cal. Sup. Ct., Aug. 22, 1979.

As put squarely by Professor Ellickson in his seminal article:

> The most pervasive judicial error in American land-development law is the reluctance to grant the remedy of damages. The deeply rooted misconception that the proper relief is usually the invalidation of part or all of the offending ordinance may be called the "*Nectow* fallacy" after *Nectow* v. *City of Cambridge,* [277 U.S. 183 (1928),] a Supreme Court decision of a half-century ago. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis,* 86 Yale L.J. 385, 490 (1977).[2]

Amici are here because the lower court is not merely reluctant to award damages, which is understandable, but, unlike any other American court, now refuses to

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E→Z+P+A=D.˙.T=IC. This simple formulation expresses in shorthand what has been a seemingly obvious concept until the *per se* rule of *Agins I*—that certain facts may lead to a legal conclusion necessitating the *appropriate* remedy (be it equitable relief or damages). The argument is not that damages are always, or frequently, the correct remedy for excessive regulatory restrictions; merely that they are a necessary judicial option, given the words and sense of the fifth amendment, at least in those few cases when property is rendered useless or valueless by harsh government actions.

[2] Professor Roberts further explains that there are cases, such as with some downzonings, when government regulation is so "unusual" as to require a remedy in damages, because the just compensation clause, like the due process and equal protection clauses, demands "fairness" in societal relationships. Roberts, *An Appropriate Economic Model of Judicial Review of Suburban Growth Control,* 55 Ind. L.J. 441, 461-64, 487-89 (1980).

permit a compensation claim even in the most outrageously-proven cases. *Agins I* (as applied to *San Diego*) is overly simplistic in its legal reasoning, bereft of any real comprehension of its social and land use ramifications, and at odds with the long-standing principles underlying the law of de facto taking.

The fifth amendment, made applicable to the states through the fourteenth amendment (*Chicago, B.&Q. R.R.* v. *City of Chicago,* 166 U.S. 226 (1897)), prohibits not only the deprivation of property without due process of law but also, in a separate clause, the taking of property without just compensation. Justice Douglas, cognizant of this language, reasoned that under some circumstances zoning regulations may constitute a compensable taking. *Village of Willoughby Hills* v. *Corrigan,* 29 Ohio St. 2d 39, 278 N.E.2d 658, *cert. denied,* 409 U.S. 919 (Douglas, J., dissenting) (1972). Citing Justice Holmes in *Pennsylvania Coal* v. *Mahon,* 260 U.S. 393 (1922), as well as the landmark zoning case of *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926), Justice Douglas noted that exercise of the police power could result in the effective taking of private property; if so,

> Arguably eminent domain *principles* then apply; and, although the public may force upon the property owner the public need for his land, compensation is due him. 409 U.S. at 920 (emphasis added).

By ruling that an aggrieved plaintiff may only make a claim for equitable relief, rather than a claim for damages, the lower court has effectively merged the Constitution's due process and just compensation clauses so as to preclude any claim under the latter.

Aside from the violence this does to the words and meaning of the fifth amendment, it makes for irrational and unfair land use policy because a government regulation could be legally valid, not justifying a declaratory, injunctive, or mandamus remedy, yet at the same time so harsh as to deny a person all reasonable use of his land, thereby justifying the inverse condemnation remedy (of course, a regulation could also be invalid and a taking as well).[3] A further effect of the lower court's decision is to shift to California's federal courts all regulatory land use cases in which an allegation of unconstitutional taking without just compensation is made, thus increasing the federal judiciary's land use law caseload, a field traditionally left to the state courts.

Equally important is the deleterious effect of *Agins I* on housing costs. From 1969 through 1979, the percentage of American families able to afford the median-priced new house has dropped from almost 40 to 22 percent. National Association of Home Builders, Economics Department; B. Frieden and A. Solomon, *The Nation's Housing: 1975-1985* 125 (Joint Center for Urban Studies of MIT & Harvard 1977). A recent federal government task force has found that since the early 1970's, rising housing costs have been "greatly exacerbated by" growing local land use regulations

[3] For the importance as to remedy in the fifth amendment's distinction between deprivation and taking, *see* Comment, *Balancing Private Loss Against Public Gain To Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 Wash. L. Rev. 315, 319-27 (1979); D. Godschalk, et al., Constitutional Issues of Growth Management 53-64 (rev. ed. 1979); D. Mandelker, Managing Our Urban Environment 624 (2d ed. 1971); Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U. L. Rev. 1238, 1253-54 (1960).

that unnecessarily restrict new housing development. "These new factors that have quickened the pace of rising housing costs portend a long-term problem for the future unless major steps are taken." U.S. Department of Housing & Urban Development, *Final Report of the Task Force on Housing Costs* 4 (May 1978); *see* U.S. General Accounting Office, *Report to the Congress—Why Are New House Prices So High, How Are They Influenced by Government Regulations, and Can Prices Be Reduced?* 41 (May 1978).

Otherwise unconstitutional land use controls that effectively exclude low and moderate income housing from the community are very difficult to challenge successfully. The *per se* remedy rule announced in *Agins I* would increase the burden much higher. If a local governing authority should have a particular control declared invalid or unconstitutional by a court, the authority all too often responds by taking another regulatory action (or, as here, combination of actions) to accomplish the same or similar result. Adopting a slightly different, or new, ordinance, plan, regulation, or permit procedure, altering a standard, or initiating a development moratorium are common examples. Even if the subsequent actions are likewise challenged successfully, the enormous time and expense involved in litigation often obliterates the original housing goal sought. And should any housing finally be constructed (usually less than originally proposed and permitted by law), the added costs of delay are inevitably borne by the housing consumer as well as builder.[4] But the

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[4] Individual prospective home buyers almost by definition are not organized in such a fashion as to exert meaningful pressure or influence on a community's exclusionary land use policies. As

natural propensity to shift regulatory gears rather than deal directly with the problem is frequently eviscerated if taking damages can be claimed and proven.[5] To paraphrase Dr. Johnson, depend upon it, sir, when a government knows it is to be assessed damages in a fortnight, it concentrates its mind wonderfully.

The Douglas Commission, in its exhaustive report to the President and Congress a decade ago, found that certain zoning and other land use control abuses unnecessarily increased housing costs to such a degree as to lead to exclusionary practices relating to residential developments. This frequently resulted when "[t]he community rigs its master plan and accompanying zoning ordinance" with "excessive" standards and prohibitions. One of the Commission's recommendations for a regulation that went so far as to take one's property was that compensation should be paid. This, the Commission thought, would assist in leading toward a more orderly urban development. Report of the National Commission on Urban Problems, *Building the American City* 18-19, 199-253 (specifically 206, 211-17, 224-26, 251) (1968). *Agins I's* effect, however, makes it much easier for parochial governments to do as they please with absolutely no judicial check (con-

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noted in a study by the Rutgers University Center for Urban Policy Research:

> The deficiency of the emphasis on [protecting existing home owner] property rights was that it failed to take into account the rights of prospective homebuyers who were excluded from any municipalities by the excessive cost of suburban homeownership. S. Seidel, Housing Costs and Government Regulations 380 (1978). *See also* M. Mann, The Right to Housing—Constitutional Issues and Remedies in Exclusionary Zoning (1976); L. Sagalyn & G. Sternlieb, Zoning and Housing Costs —The Impact of Land-Use Controls on Housing Price (1973).

[5] *See* note 13 *infra*.

stitutional remedy) available should some control go too far and result in compensatory damage and, therefore, makes it much harder to surmount excessive or arbitrary policies that push up housing costs.

Professor Williams summed it up best in his landmark treatise when he recognized that inverse condemnation[6] "can play a useful role as part of an overall land use regulation system, to provide some protection for landowners against de facto takings." 5 N. Williams, American Planning Law—Land Use and the Police Power § 159.18 (1975). More to the point, this Court as recently as last term acknowledged in a legislative immunity case the *constitutional right to file* an "inverse condemnation" action, ruling further that this was not the occasion to review the circuit court's holding that a violation of the due process clause had been adequately alleged, in which appellants had claimed that an improper exercise of the police power had led to a "taking" or an "inverse condemnation." *Lake Country Estates* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 395-96, 397 n.11 (1979); *see Jacobson* v. *Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir. 1977).

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[6] Defined as "the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Thornburg* v. *Port of Portland,* 233 Or. 178, 180 n.1, 376 P.2d 100, 101 n.1 (1962); *City of Jacksonville* v. *Schumann,* 167 So.2d 95, 98 (1st D.C.A. Fla. 1964), *cert. denied,* 172 So.2d 597 (Fla. 1965), *cert. denied,* 390 U.S. 981 (1968) (takings found in airplane overflight cases); 11 E. McQuillin, The Law of Municipal Corporations § 32.132a (3d ed. rev. 1977). More simply, "inverse condemnation" has been described as an action "to redress a taking without compensation." *Sixth Camden Corp.* v. *Township of Evesham,* 420 F. Supp. 709, 721 (D.N.J. 1976).

What this Court acknowledged as constitutionally allegable on March 5, 1979, the California *Agins* court read abruptly out of the Constitution nine days later, causing a reversal of the holding, as well as policy and logic, enunciated by a unanimous Court of Appeal in *San Diego.*

Lake Country Estates is the tip of an iceberg of Supreme Court taking cases stretching back a century. The first notable such case, *Pumpelly* v. *Green Bay Co.,* 80 U.S. (13 Wall.) 166 (1871), found a compensable taking when flooding effectively destroyed a property's usefulness despite the absence of an actual appropriation for public use. It exemplifies the simplest type of inverse taking, that of physical invasion. *Pumpelly* also provides a vivid illustration of the essense of inverse condemnation (a phrase that gained prominence in the 1960's)—the transmutation of police power exercise or regulation into an exercise of compensable taking. As explained in 2 P. Nichols, The Law of Eminent Domain § 6.1[1] (3d ed. rev. 1976):

> Any limitation on the free use and enjoyment of property constitutes a *taking* of property within the meaning of the *constitutional provision.* It is sufficient that the person claiming *compensation* has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation . . . .
>
> *Constitutional rights rest on substance, not on form,* and the liability to pay compensation for property taken cannot be evaded by leaving the title in the owner, while depriving him of the beneficial use of the property. It has already been shown that a legal restriction upon the use of land may constitute a taking, *although the title is unaffected and the land is physically untouched,*

> and the same is true when the owner's enjoyment of the land is physically interfered with although his legal rights remain unimpaired. (emphasis added).

A half century after *Pumpelly,* the philosophical underpinning of inverse condemnation gained its fullest expression in the "leading"[7] taking case of *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922). Justice Holmes framed the question of the case as "whether the police power can be stretched so far"[8] and went on to hold *not* when "the extent of the taking is great."[9] Hence it has for years been persuasively demonstrated that grievous abuse of the police power can be remedied, where proven appropriate, by constitutional just compensation. Equally important for purposes of this appeal, the *right to file* and attempt to prove such a claim is obviously implicit in the Court's result.

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. [cite omitted]. When this seemingly absolute protection is found to be *qualified by the police power, the natural tendency of human nature is to extend the qualification more and more* until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

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[7] *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 127 (1978).

[8] 260 U.S. at 413.

[9] 260 U.S. at 414.

> *The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . .* We are in danger of forgetting that *a strong public desire to improve the public condition is not enough* to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. 260 U.S. at 415-16 (emphasis added).

The lower court plainly succumbed to that "natural tendency of human nature." Instead of determining if a specific case for inverse condemnation had been adequately made out and proven in *San Diego,* the court (in *Agins I*) merely acknowledged the public value of land use planning and execution ("to improve the public condition") and then inexplicably placed that value forever above the Constitution's just compensation clause.

Most recently, this Court has rejected such a peremptory approach in the telling decision of *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979). In finding that a compensable taking had occurred based on the case's circumstances, the opinion of the Court reasoned that the government's regulation or use of petitioners' property had gone "so far . . . as to amount to a taking under the logic of *Pennsylvania Coal* v. *Mahon,* 260 U.S. 393 (1922)." 444 U.S. at 178. Put simply and directly, the remedy rule of *Agins I* just does not square with a century's worth of taking law nor with basic fairness.

It is legal and social folly to strive for worthy environmental improvement (here, the city deemed the

company property desirable as open space) by simplistically pitting the taking question as "police power" versus "eminent domain power" exercise.

> There is an almost *irresistable urge* in this matter to think of the question in terms of police power versus eminent domain—as if the choice of means for working for environmental improvement had to be either one or the other. The process of choosing means for implementing policy goals for environmental improvement thus tends to start with the premise that public agencies should first see how far they can go in requiring landowners to submit to regulatory controls of land use, and resort to eminent domain techniques only where the courts compel them to compensate landowners for a "taking" of property. Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain,* 3 Land & Water L. Rev. 33, 50 (1968) (emphasis added).

Netherton, explaining that the either/or approach is an unfair and unwise way to protect the community environment, argues for the judicious approach in the "gray areas between those situations where it is obvious that police power should be used and those where it is not so obvious":

> During the period of experimental regulation the landowner's interest can be protected by recourse to an action in *inverse condemnation* where he can sustain the burden of proving damages. Netherton at 55 (emphasis added).

Yielding to the "irresistable urge," the court below, despite explicit constitutional provisions against takings [10] and countless judicial rulings thereunder, has

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[10] The California Constitution's just compensation clause is technically broader than that of the United States Constitution. It

created an illusory distinction that, in practice, renders inverse condemnation suits nugatory in California courts. As Professor Waite, who supports *Pennsylvania Coal's* "diminution of property value" test as one way of judging when police power regulation becomes compensable, said:

> Today it is hard to justify the different compensation philosophies applied to landowners in eminent domain and police power matters . . . . [R]emembering property to be a bundle of rights, it is clear this distinction, too, is illusory. The *substantive* content of title is largely rights of use, and in *both* situations a transfer has occurred . . . Waite, *Governmental Power and Private Property,* 16 Cath. U.L. Rev. 283, 292 (1967) (emphasis added).

This distinction without a difference in the taking context,[11] implicit in *Pennsylvania Coal* and taking cases since, is perhaps most forcefully explicated by the Texas courts. In *San Antonio River Authority* v. *Garrett Brothers,* 528 S.W.2d 266, 273 (Tex. Civ. App.

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reads: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." Cal. Const. art. 1, § 19. Half the states have "damaged" provisions in their constitutions (all fifty have just compensation clauses, which have been interpreted as substantially the same as the federal clause, with or without the "damaging" language). Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage,* 28 Stan. L. Rev. 779, 779 n.2 (1976).

[11] *See* Berger, *To Regulate, Or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights,* 8 Loy.L.A.L. Rev. 253, 268-75 (1975); Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain By the Courts: So-Called Inverse or Reverse Condemnation,* 1968 Urb. L. Ann. 1, 4.

1975), where a compensable "temporary taking" was found in a city's refusal to issue utility permits for land the city might later acquire, the court explained:

> If there is a taking the constitution requires payment, even though the taking be for the purpose of promoting the public health, safety, morals or welfare and, therefore, involves an exercise of the police power. [cites omitted]. *The empty formalism of "police power" cannot be made the basis for denying compensation,* and the Texas Supreme Court has expressly refused to "compartmentalize an exercise of sovereignty as either police power or eminent domain for the resolution of [taking] problems arising under [the state constitution]." (emphasis added).[12]

It is one thing to review the facts and circumstances of a case and then to reject its claims as improvidently made or ill proven. It is quite another matter, however, to decide for expedient reasons that a constitutional

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[12] In a later case for "inverse condemnation" damages, where a city denied a development permit in order to gain a scenic easement for the public, the court stated:

> [T]here is really no distinction between the powers of eminent domain and an exercising of the police power, when a person's property is taken or the use of same damaged by the state (or city). A person's property may not be taken or damaged as an incident to the exercise of the police power without the payment of compensation. *City of Austin* v. *Teague,* 556 S.W. 2d 400, 403 (Tex. Civ. App. 1977).

The state supreme court reversed on other grounds and remanded for retrial of the amount of damages and noted:

> The labels are not helpful. These two doctrines—police power and eminent domain—*merge at so many places when applied to specific problems,* that the legal battlefields have been variously termed a "sophistic Miltonian Serbonian Bog," . . . a "crazy-quilt pattern," . . . "the manifest illusoriness of distinctions," . . . . 570 S.W. 2d 389, 397 (Tex. 1978) (emphasis added).

cause of action can no longer even be raised under any circumstances for fear that it may disrupt the regular flow of governmental land use decisions. This unfounded fear of governmental disruption is especially ironic given the profound disruption now to be visited upon the principle supporting an equitable approach to land management and the providing of affordable housing. Until the *Agins I* opinion, the just compensation clause has never been treated by any court as sheerly precatory language.

II. The Decision of the Court Below Is Manifestly Contrary to the Case-By-Case Review Required by the Just Compensation Clause and Rulings of This Court.

The constitutional dilemma peremptorily sworn off by the lower court was specifically addressed by this Court in *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978). A classic taking case, the issue was whether application of a regulatory land use ordinance resulted in a "temporary taking" of property without just compensation in violation of the fifth and fourteenth amendments. 438 U.S. at 107, 119. While *Penn Central* acknowledged the high burden of proving a taking and, under the facts of the case, found no taking had occurred, *its comprehensive analysis upholds the constitutional right to make the claim and attempt to prove it under law.* That is precisely what occurred in *San Diego* before it was reversed. This right becomes absolutely fundamental because taking questions are "essentially ad hoc, factual inquiries" with no "set formula" to guide a court since the very question of a taking "depends largely upon the particular circumstances" of each case. 438 U.S. at 124; *Kaiser Aetna, supra,* at 175 (taking

found); *see* Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty* in Southwestern Legal Foundation, Proceedings of the Institute on Planning, Zoning, and Eminent Domain 177 (1980).

Save for the erratic compensation holding announced in *Agins I*, the necessity of case-by-case constitutional analysis has been uniformly emphasized by courts and commentators alike. Again, Justice Holmes sets the framework in *Pennsylvania Coal:*

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends on the particular facts . . . [I]t always is open to interested parties to contend that the legislature has gone beyond its constitutional power.* 260 U.S. at 413 (emphasis added).

In *Berman* v. *Parker*, 348 U.S. 26, 32 (1954), in which a property owner alleged that a land use plan for urban renewal violated both the fifth amendment's due process and just compensation clauses as applied to his land, Justice Douglas said without reservation:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, *for each case must turn on its own facts.*

> (emphasis added) (*accord, e.g., Armstrong* v. *United States,* 364 U.S. 40, 48 (1960)).

And the Court in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 594 (1962), in upholding an ordinance that prevented further mining by appellant, firmly noted:

> This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. [cites omitted]. *There is no set formula to determine where regulation ends and taking begins.* (emphasis added).

Doubtlessly, then, case-by-case determinations of whether land use controls result in compensable takings must be made. 1 R. Anderson, American Law of Zoning § 3.25 (2d ed. 1976); 11 E. McQuillin, The Law of Municipal Corporations § 32.26 (3d ed. rev. 1977); 2 P. Nichols, *supra,* at § 6.3; 1 A. Rathkopf, Law of Planning and Zoning § 6.02 (4th ed. 1978); 2 P. Rohan, Zoning and Land Use Controls § 7.03[3][d] (1978); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 S. Cal. L. Rev. 1, 13-48 (1970); Waite, *supra,* at 289. Otherwise, the very words of the just compensation clause ring hollow. "The issue of regulation as against taking is always a matter of degree." *Morris County Land Improvement Co.* v. *Township of Parsippany - Troy Hills,* 40 N.J. 539, 193 A.2d 232, 241 (1963); *accord, e.g., Donohoe Construction Co.* v. *Montgomery County Council,* 567 F.2d 603, 608 n.13 (4th Cir. 1977); *Dahl* v. *City of Palo Alto,* 372 F. Supp. 647, 648 (N.D. Cal. 1974); *Hermanson* v. *Board of County Commissioners,* 595 P.2d 694 (Colo. App. 1979); *Brecciaroli* v.

Connecticut Commissioner of Environmental Protection, 168 Conn. 349, 362 A.2d 948, 951-52 (1975); *Bureau of Mines* v. *George's Creek Coal and Land Co.,* 272 Md. 143, 321 A.2d 748 (1974); *Commissioner of Natural Resources* v. *S. Volpe & Co.,* 349 Mass. 104, 206 N.E.2d 666, 669-70 (1965); *Aronson* v. *Town of Sharon,* 346 Mass. 598, 195 N.E.2d 341, 345 (1964); *Penn Central Transportation Co.* v. *New York City,* 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd,* 438 U.S. 104 (1978); *City of Austin* v. *Teague,* 570 S.W.2d 389, 393 (Tex. 1978).

The ineluctable logic and reasonableness of what the law has been is reflected in what the law *should* be as well. The American Law Institute advocates that:

> The particular circumstances of *each case* must be examined to see on which side of the regulation/taking line it falls. [cites omitted].
>
> This Code authorizes the payment of compensation in those cases in which the agency feels that the elimination of existing uses would impose too great a burden on the property owner. (§ 5-102). The Code makes no attempt to define the conditions under which compensation *must* [emphasis in original] be paid. *This is a basic constitutional issue that can be left to case-by-case decision . . . .* Under this Code a landowner who convinces a court that a regulation is unconstitutionally restrictive *may obtain compensation* or a declaration of the regulation's invalidity. (§ 9-111). ALI Model Land Development Code 155-56 (1976) (emphasis added).

Thus inverse condemnation actions clearly form an organic and inseparable part of the fifth and fourteenth amendments. The "authority is overwhelming"

that confiscatory regulation gives rise to such relief.[13] Indeed, de facto taking claims have become so commonplace in American legal theory that courts have developed four sometimes overlapping approaches for supporting an award of damages for an unconstitutional taking of property. D. Godschalk, et al., Constitutional Issues of Growth Management 53-64 (rev. ed. 1979); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1183-1201 (1967); Sax, *Takings, Private Property and Public Rights,* 81 Yale L.J. 149, 151 (1971); *Developments in the Law—Zoning,* 91 Harv. L. Rev. 1427, 1462-1501 (1978). These approaches, or tests, are generally referred to as those for:

1) *physical invasion*—the elementary approach, represented by *Pumpelly* and *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) (airplane overflight case); but as stated in *Penn Central,* "we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel." 438 U.S. at 123 n.25;

2) *diminution of value*—the approach exemplified by *Pennsylvania Coal,* in which a regulation that causes an excessive decline in a property's market value effects a taking;

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[13] Berger, *supra* note 9, at 279. Professor Dunham, in a seminal article, reasons that the inverse condemnation remedy would check arbitrary land use regulation by striking a constitutional balance between public gain and private cost. Dunham, *supra* note 3. In addition to Berger and Dunham, two other noted land use law professors provide lucid discussions of the social need, as well as constitutional requirement, for compensatory regulation via the inverse condemnation remedy. *See* Beuscher, *supra* note 9; Hagman, *Compensable Regulation: A Way of Dealing with Wipeouts from Land Use Controls?,* 54 U. of Det. J. Urb. L. 45 (1976).

3) *nuisance abatement*—if a regulation prevents a harm (abates a nuisance) no compensable taking occurs, but if it confers a benefit on the public then damages are awarded; this test, formulated in E. Freund, The Police Power § 511 (1904), finds examples in the *San Diego*-like *Dahl, supra* (rezoning property to open space in order to avoid cost of acquisition gives rise to constitutional "inverse condemnation" action), and *State* v. *Griggs,* 89 Ariz. 70, 358 P.2d 174 (1960) (a regulation that saves government money rather than protects the public health or safety from an injurious use of land is an unconstitutional taking without compensation; *cf. Cardon Oil Co.* v. *City of Phoenix,* 122 Ariz. 102, 593 P.2d 656 (1979)); and,

4) *balancing of interests*—the broadest test, this weighs the public good against private detriment, considering such factors as a regulation's duration and impact on use of land, the harm sought to be cured, and whether objective studies support the need and scope of the regulation; its essence, as Professor Michelman would emphasize, is that of "fairness" (*see, e.g., Brecciaroli, supra,* and *Village of Willoughby Hills, supra*).

Certainly this Court has recognized the ad hoc nature of judging "taking without just compensation" claims by looking at such factors as the "economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action. . . ." *Kaiser Aetna, supra,* at 175. Implicit in the need for weighing both private and public interests (*Agins II, supra,* at 2141) is the realization that a compensation remedy could never be precluded in every conceivable case.

The stunningly absolutist approach adopted by the lower court, however, patently denies any factual inquiry into damage and remedy and thereby begs the taking question before it can be rightfully posed. Since the 1960's, land use law has become far more than planning, zoning, subdivision, and urban renewal, and now encompasses more complex issues of environmental regulation, historic preservation, transfers of development rights, growth management, and all facets of how land is to be used, developed, and controlled, balancing private rights with public needs. Turning the salient constitutional issue of differing applications of land use regulation into an either/or contest unnecessarily belittles both the Constitution and conservation. As the Supreme Judicial Court of Massachusetts so presciently observed:

> The [government] argue[s] as though all that need be done is to demonstrate a public purpose and then no regulation in the interests of conservation can be too extreme. . . An unrecognized taking in the guise of regulation is worse than confiscation. . .
>
> In this conflict between the ecological and the constitutional, *it is plain that neither is to be consumed by the other. Commissioner of Natural Resources* v. *S. Volpe & Co.*, 349 Mass. 104, 206 N.E. 2d 666, 671 (1965) (emphasis added).[14]

Compensatory takings thus occur primarily in two critical situations: whenever a zoning ordinance pre-

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[14] For discussions of how highly questionable zoning and land use practices are increasingly being clothed in the respectable language of environmental protection, *see* M. Brooks, Housing Equity and Environmental Protection: The Needless Conflict 2 (1976); R. Nelson, Zoning and Property Rights—An Analysis of the American System of Land-Use Regulation 162-63 (1977).

cludes reasonable use of a property, and whenever a government places an undue and uncompensated burden on an individual landowner in order to achieve a public good. 1 A. Rathkopf, *supra. San Diego* includes classic taking issue elements: an acquisitive intent (and effect) evidenced by the combination of an acquisition resolution including the subject property, the rezoning of a portion of the land to a lower density, and the designation of the property as "open space" on the city's general plan. Compensatory takings in the land use context have been found or permissibly alleged time after time in cases with elements such as these. Well known examples from across the nation include:

Zoning—Sixth Camden Corp. v. *Township of Evesham,* 420 F. Supp. 709 (D.N.J. 1976) (inverse condemnation action under fifth and fourteenth amendments); *Dahl, supra* (inverse condemnation; open space rezoning); *Klopping* v. *City of Whittier,* 8 Cal. 3d 39, 500 P.2d 1354, 104 Cal. Rptr. 1 (1972) (inverse condemnation); *Petersen* v. *City of Decorah,* 259 N.W. 2d 553 (Iowa App. 1977); *Aronson, supra; Morris County Land Improvement Co., supra* (to keep land in substantially natural state); *Village of Willoughby Hills, supra.*

Subdivision, development—Gordon v. *City of Warren,* 579 F.2d 386 (6th Cir. 1978); *Hotel Coamo Springs, Inc.* v. *Hernandez Colon,* 426 F. Supp. 664 (D.P.R. 1976); *Estuary Properties, Inc.* v. *Askew,* 381 So. 2d 1126 (Fla. App. 1979); *Ventures in Property I* v. *City of Wichita,* 225 Kan. 698, 594 P.2d 671 (1979) (inverse condemnation); *Lomarch Corp.* v. *Englewood,* 51 N.J. 108, 237 A.2d 881 (1968) ("temporary tak-

ing"); *City of Austin* v. *Teague*, 570 S.W. 2d 389 (Tex. 1978) (inverse condemnation; denial of permit to gain scenic easement); *San Antonio River Authority, supra* ("temporary taking");

Planning—Washington Market Enterprises, Inc. v. *City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975);

Police power combinations—Donohoe Construction Co., supra (planning, zoning, subdivision, building permit actions); *Sanfilippo* v. *County of Santa Cruz*, 415 F. Supp. 1340 (N.D. Cal. 1976) (inverse condemnation; planning and zoning); *Peacock* v. *County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969) (inverse condemnation; planning, zoning, and subdivision actions); *Hermanson, supra* (inverse condemnation; zoning, sewer regulation, and building moratorium);

Other police power regulations—Petz v. *United States*, 209 Ct. Cl. 270, 531 F.2d 1018 (1976) (inverse condemnation; ban of barges within federal park to maintain natural state); *Bydlon* v. *United States*, 146 Ct. Cl. 764, 175 F. Supp. 891 (1959) (ban of low-level air travel over national forest to maintain natural state); and,

Eminent domain (dilatory or abandoned)—Thomas W. Garland, Inc. v. *City of St. Louis*, 596 F.2d 784 (8th Cir. 1979); *Richmond Elks Hall Association* v. *Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977) (inverse condemnation); *Foster* v. *City of Detroit*, 405 F.2d 138 (6th Cir. 1968); *Madison Realty Co.* v. *City of Detroit*, 315 F. Supp. 367 (E.D. Mich. 1970); *Haczela* v. *City of Bridgeport*, 299 F. Supp. 709 (D. Conn. 1969); *Benenson* v. *United States*, 212 Ct.

Cl. 375, 548 F.2d 939 (1977) (inverse condemnation); *Drakes Bay Land Co.* v. *United States,* 191 Ct. Cl. 389, 424 F.2d 574 (1970); *Clifton* v. *Berry,* 244 Ga. 78, 259 S.E.2d 35 (1979) (inverse condemnation); *Hardesty* v. *State Roads Commission,* 276 Md. 25, 343 A.2d 884 (1975) (scenic easement); *Lincoln Loan Co.* v. *State Highway Commission,* 274 Or. 49, 545 P.2d 105 (1976); *Miller* v. *City of Beaver Falls,* 368 Pa. 189, 82 A.2d 34 (1951); *In re Cornell Industrial Electric, Inc.,* 19 Pa. Commw. 599, 338 A.2d 752 (1975).

The Supreme Court opinions in *Pumpelly, Pennsylvania Coal,* and *Penn Central* are major pronouncements of the unwavering constitutional principle that private property cannot be appropriated via exercise of the police power without payment of just compensation. *Kaiser Aetna* pellucidly affirms the principle. The above litany of federal and state cases bears that point out as well as the more fundamental point that the fifth and fourteenth amendments insure, at minimum, *the right to make a claim for a taking of property.*

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. . . . In fact, a *fundamental interdependence* exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. *That rights in property are basic civil rights has long been recognized. Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 552 (1972) (emphasis added).

The severe and singular remedy approach adopted in *Agins I* and applied in *San Diego,* denying for the fu-

ture any chance for a case-by-case taking analysis, flies in the face of both the Constitution and Supreme Court rulings thereunder. At its heart, the Constitution seeks that necessary balance between individual rights, personal and property, and public necessity. That is the essence of fairness, and, at bottom, the value of constitutional scrutiny.

CONCLUSION

For the above reasons, the Court should note probable jurisdiction and reverse the decision of the Supreme Court of California.

Respectfully submitted,

GUS BAUMAN
National Housing Center
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 452-0232

Counsel for Amici

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No. 79-678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

SAN DIEGO GAS & ELECTRIC CO.,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

Appeal From The Supreme Court of California

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE IN SUPPORT OF APPELLANT

National Association of Manufacturers
of the United States of America
1776 F Street, N.W.
Washington, D.C. 20006

GIDEON KANNER
1440 West Ninth Street
Los Angeles, California 90015
(213) 642-2951
Attorney for Amicus Curiae

Of Counsel:

THOMAS J. HOUSER
General Counsel

JANICE S. AMUNDSON
Assistant General Counsel

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Appellants.

The National Association of Manufacturers (NAM) is incorporated under the laws of the State of New York as a non-profit voluntary business association. NAM represents approximately 12,000 members engaged in manufacturing and related businesses, whose employees comprise an estimated 78% of the nation's manufacturing work force. NAM members are engaged in a wide variety of land and resource based activities, including forest

products, coal, oil and gas, hard rock minerals, water resource development, agriculture, and land development and building. Members are located in all 50 states, in urban, suburban and rural areas. NAM members have a large stake in the stewardship of land and resources and are deeply concerned about government encroachments on the use of land and resources.

ARGUMENT

THERE IS A VACUUM OF LEGAL PRINCIPLE IN THE FIELD OF INVERSE CONDEMNATION THAT DESPERATELY NEEDS THIS COURT'S ATTENTION.

The past decade has witnessed a "regulatory explosion." Sometimes, even a single regulation deprives a land owner of the use of his property. Certainly, when taken together, interrelated or overlapping regulatory activity often effectively prohibits all reasonable or economically viable use. NAM respectfully urges that the "taking issue"—both in its substantive and remedial aspects—is ripe for definitive, analytical treatment by this Court. The *ad hoc,* case by case approach favored by this Court thus far [1] has with the passage of time led to a situation in which predictability has been sacrificed to flexibility to such an extent that neither private nor public parties across the Nation are able to ascertain what their rights are without first litigating through the highest appellate levels. This is wasteful of the parties' and courts' resources, and in some parts of the country has inspired chaotic conditions.[2]

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[1] *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104, 123-124 (1978).

[2] Two noted commentators have aptly termed the situation "a synergistic nightmare, a paralyzing mishmash", and a "bubbling cacophony of multitudinous edicts". Hagman and Misczynski, *The Quiet Federalization of Land Use Controls: Disquietude in The Land Markets,* The Real Estate Appraiser, Sep.-Oct. 1974, at p. 7.

The avowed *ad hoc* nature of such law as exists merely provides incentives to further litigation as both sides to this controversy press their causes on the courts in an effort to reduce to precedent the infinitely variable facts of each individual dispute. To be sure, the flexibility employed by the Court thus far, has much to commend it, but on the other hand, the nation desperately needs definitive constitutional guidance from this Court as to where flexibility ends and guiding precedent begins.

Moreover, the traditional mechanisms of land use regulation have undergone a revolutionary change in the last decade. The notion of yore that construction of improvements on land need only be preceded by compliance with zoning ordinances and building codes, and issuance of a building permit, has by now joined such venerable images as the hand-cranked automobile. It would impermissibly swell this brief to provide even a thumbnail sketch of the details of today's regulations. Suffice it to say that in some portions of California as many as a dozen permits may be required before a landowner may construct a single family dwelling for his own use.[3] In the case of larger scale projects, the regulatory travails become mindboggling, with literally scores of permits from scores of agencies required, all resulting in an economic nightmare that at times not

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[3] In the aftermath of this Court's decision of *Agins* v. *City of Tiburon*, —— U.S. —— [65 L. Ed. 2d 106] (1980), a knowledgeable commentator noted that it would have cost Mr. and Mrs. Agins some $50,000 to apply for permission to build, "[a]nd spending that sum would not have necessarily gotten them permission to build five houses. The answer to the question 'Simon, may I build?' might have been, 'Yes, but only one or two houses.' " Smith, *An Inverse Condemnation Puzzle: The Agins Case Lands in Limbo*, 2 Nat. L. Jour. (No. 2, Aug. 4, 1980, p. 52, at 53). That answer—it must be noted—might also have been "No, you can't build at all. We don't like your project".

even the nation's wealthiest enterprises can afford.[4] See *Owen* v. *City of Independence*, —— U.S. —— [63 L. Ed. 2d 673, 693, fn. 33] (1980).

Another vitally important element of the revolutionary change in land use regulation is the recent explosive balkanization of regulatory authority. No longer is one confronted with obtaining approval from a readily identifiable local regulatory entity. The historical dominance of this area by towns and counties has been diluted and overlaid by a layer cake of agencies that range all the way from state and regional bodies (such as the California Coastal Commission), all the way to bistate entities (such as the Tahoe Regional Planning Agency) and federal agencies. Along with these novel regulatory super-agencies, the land use regulatory process has also been honey-combed from the bottom, as it were, by a multitude of mini-authorities[5]

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[4] It is undoubtedly subject to judicial notice, in light of these events' enormous notoriety and (in one instance) public comments by the President of the United States, that such giants as Sohio, Dow Chemical, and Walt Disney were forced to abandon their plans for major projects in California, not because these projects were ever substantively adjudged to be illegal or environmentally "bad", but simply because not even these enterprises, for all of their Croesus-like resources, could bear the economic burdens of interminable regulatory maneuverings that after the expenditure of many millions of dollars and years of effort, produced no approvals, and only promised further consumption of time and money in pursuit of increasingly hydra-headed regulatory demands, with no prospect of resolution in sight.

[5] An excellent, if horrifying, example of such balkanization in action is *Department of Natural Resources* v. *Thurston County*, 601 P.2d 494 (1979, Wash.), now pending before this Court on appeal as *Lake Lawrence, Inc.* v. *Thurston County*, No. 79-1880, where a landowner found himself in the role of shuttlecock bouncing between different local agencies with diverse views as to what land uses would be permitted. Also see *Raley* v. *Calif. Tahoe Regional Planning Agency*, 68 Cal. App. 3d 965, 984-985, 137 Cal. Rptr. 699 (1977) where the intermediate appellate court deplored the "administrative anarchy" but found itself powerless to grant relief because of California Supreme Court's rulings.

such as local wetlands and historical conservation districts, water and sewage districts, all the way down to something called a "neighborhood" (see Revised Charter of the City and County of Honolulu, 1973, Art. XIII, Sec. 13-101 et seq.). Finally, as if all that were not enough, it now seems clear that the people of a community, can simply take matters into their own hands, and by initiative or referendum vote to change the zoning of even a single lot in their community. See *City of East Lake* v. *Forest City Enterprises,* 426 U.S. 668 (1976).

It is not the purpose of this discussion to debate here the wisdom of such arrangements; the point rather is that governmental arrangements have necessary constitutional consequences, and legal approaches evolved in an earlier day frequently prove ineffective to protect constitutional rights, as those rights come under attack by techniques undreamed of when the basic principles of pertinent law were laid down more than a half-century ago. In short, just as this Court noted the need to recognize the changing social conditions in approving novel regulations (see *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 387 (1926)), so too, there is a correlative need to recognize that eventually the new regulations impact on society in ways unanticipated in the past. The problem which desperately needs attention from this Court is that these mushrooming regulatory powers must somewhere along the line be circumscribed by the vital concept of accountability to the Constitution. The traditional judicial deference to land use regulations needs to be balanced against constitutional values; eventually this facet of governance—like all others —must be recognized as having discernible limits, and the nation needs to be told what those limits are. See *Moore* v. *East Cleveland,* 431 U.S. 494, 513-514 (1977), Stevens, J., concurring. Great governmental powers without such limits invite abuses. For example, no sooner did the California Supreme Court decide *Agins* v. *Tiburon,* than Congressman Beilenson wrote to Los Angeles area

officials exhorting them to prevent private use of land that is contemplated for acquisition by the federal government, as the Santa Monica Mountains Park, asserting that such course of action was risk free. Similarly, on December 14, 1979, the General Accounting Office issued a report (No. CED-80-14) entitled "The Federal Drive to Acquire Private Lands Should be Reassessed", which *inter alia* urges that the government resort to restrictive zoning in lieu of acquisition, and that it rely on local governments' use of the zoning powers to accomplish effective conversion of private lands into public open space without paying for it.

The principal problem with current regulatory reality is that all too often the regulating is done by diverse entities with fragmented parochial interests. With their good intentions fueled by perceived (or at least professed) nobility of their socio-ideological goals (such as protection of the environment, urban aesthetics, historical preservation, growth control, etc.) they promulgate regulations that often stultify literally all economically rational use of stretches of land. The spector of American landowners being told to pay their taxes while simultaneously being denied any rational use of their property that would justify the values on which they are being taxed is not an exaggeration; it is a growing reality in many parts of this country.[6] These observations must not be understood as

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[6] Thus, California law is replete with cases in which landowners are driven into bankruptcy and foreclosure while being denied any economically rational use of their land. See e.g., *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353, 1366-1367 (1978, 9th Cir.); *Orsetti* v. *Fremont*, 80 Cal. App. 3d 961, 146 Cal. Rptr. 75 (1978), *Hollister Park Investment Co.* v. *Goleta County Water Dist.*, 82 Cal. App. 3d 290, 147 Cal. Rptr. 91 (1978); *Frisco Land & Mining Co.* v. *State*, 74 Cal. App. 2d 736, 141 Cal. Rptr. 820 (1977); *Klopping* v. *City of Whittier*, 8 Cal. 3d 39, 58, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972), *County of Los Angeles* v. *Berk*, 26 Cal. 3d 201, 161 Cal. Rptr. 742, 605 P.2d 381 (1980), now pending before this Court on Petition for Certiorari as No. 79-1950; *Toso* v. *City of Santa Barbara*, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (1980), now pending before this Court on Petition for Certiorari as No. 80-205.

in any way derogating from the goals of good faith regulations intended to preserve for ourselves and for posterity the blessings of a wholesome environment. Rather, the point is that however commendable these ends may be, they must still be pursued by means that are respectful of the Constitution. To put it another way, one must not confuse the state police power with the power of a police state.

The blunt fact is that there are simply *no* readily ascertainable and pragmatically applicable legal criteria whereby one can gauge when all this burgeoning regulatory activity trenches on constitutionally protected rights.[7] An American citizen in one state finds that his supposed *federal* constitutional rights bear no resemblance to his fellow citizen's rights in other states.

A supposed "property" system in which the ostensible owner cannot tell what rights he "owns" until he tries to exercise them, and even then only after ruinously costly (and often pointless) administrative proceedings with a whole separate multi-tier appellate process, and only then ligitation in the courts, is an illusion. Only the most wealthy (and the most determined) persons can even try to seek protection of their constitutional rights. Such a system, moreover, is alarmingly akin to the feudal arrangement of medieval times, where only the king actually owned land, and everyone else merely "held of" him. See McGlaughry, *Farmers, Freedom and Feudalism: How to*

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[7] As the California Supreme Court conceded, the judicial patterns of distinguishing between "taking" and "police power" ". . . at best . . . have served as a shorthand method of indicating the result . . .", *HFH, Ltd.* v. *Superior Court*, 15 Cal. 3d 508, 522, 125 Cal. Rptr. 365, 542 P.2d 237 (1975). Surely, the institution of property and the constitutional values inherent in it (see *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972)), are entitled to a greater degree of judicial protection than such semantic manipulation.

Avoid the Coming Serfdom, 21 S.D. L. Rev. 486 (1976). History teaches that such a system inevitably leads to social polarization and class friction (as the politically connected haves enjoy the "royal" favor at the expense of the have nots). After all, as this Court astutely observed in *Willow River Power Co.* v. *United States,* 323 U.S. 499, 502-503 (1945), "property rights" are only those economic advantages which the law will protect. Disabling one from being able to tell what the law will protect (and worse, *de facto* removing such legal protection, while paying lip service to it), effectively destroys the very idea of property. The *Willow River* concept of legally protected economic advantage is thus *de facto* transmogrified into a system in which the legal protection of economic advantage flows not from neutral legal principles, but from the practically unreviewable whim of a local (often parochially-minded and politically inspired) regulatory body. Bearing in mind that "property" is not the physical object but the group of rights that attaches to it (see *United States* v. *General Motors Corp.,* 323 U.S. 373, 377-378 (1945)), a dilution of such rights to the point of their practical unavailability, also accomplishes a *de facto* transfer of those rights to the government (see *Id.* at 378). This is particularly true of the right of user; if one's right to use one's property is gone, virtually nothing is left, save the dubious privilege of paying taxes and bearing other economic burdens of property ownership. Appellee's position ultimately means that there are *no* property rights in the land, except to the extent the local regulators choose to create them by issuance of a permit.

A RATIONAL AND FAIR SYSTEM OF REMEDIES FOR TAKINGS MUST INCLUDE JUST COMPENSATION TO BE EFFECTIVE AND SOUND.

No constitutional guarantee, however basic and noble, can have meaning unless it is not only enforceable, but also enforceable in an effective fashion. Just as this Court has recognized the basic need for flexibility in making determinations of whether takings have occurred, so too there ought to be embedded in the law flexibility in providing remedies. Sometimes, invalidation may be what is needed; at other times, however, just compensation may be the only remedy that will make the owner whole—indeed, it may be desirable from the government's point of view where major policies are pursued by the challenged regulations.

Thus, the arguments of Appellee that would establish an absolutist dogma forbidding payment of just compensation in all cases of regulatory takings, irrespective of circumstances or of the economic impact on the aggrieved owner, warrant rejection out of hand. This conclusion is both pragmatic and finds support in this Court's unbroken chain of decisions dealing with remedies for takings: *Hurley* v. *Kincaid,* 285 U.S. 95 (1932); *Dugan* v. *Rank,* 372 U.S. 609 (1963); *Fresno* v. *California,* 372 U.S. 627 (1963); *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). Also, see *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 752-753 (1950) (taking effected by state police power measure gives rise to right to just compensation, even though invaded right not protectible by injunction).[8]

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[8] For a fuller discussion of *Gerlach* in the context of California law, see Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty,* 1980 Institute on Planning, Zoning and Eminent Domain, Southwestern Legal Foundation, p. 177, at 199-204.

A. This Court's Precedential Analysis Favors Just Compensation as a Remedy.

Both in terms of holding and rationale, *Hurley* v. *Kincaid, supra,* is well nigh dispositive. The Court's rejection of the owner's attempt to secure a non-monetary remedy is both clear and logical. Of particular interest is the Court's reasoning that proceeds from the premise that the Act in issue there was valid[9] (285 U.S. at 103), and once that is established, the question becomes whether the owner's constitutional rights are protected when just compensation is provided, or whether the whole law must fall because of lack of compensation. Mr. Justice Brandeis' answer to that question in *Hurley* is difficult to quarrel with: the owner's grievance in such cases is *not* that the government takes his land, but rather that the taking has not been accompanied by compensation. In other words, it is the lack of compensation that offends the constitution, not the taking, for the latter is an inherent power of government that exists independently of the Constitution which only imposes conditions to its exercise (*Miss. & Rum River Boom Co.* v. *Patterson,* 98 U.S. 403, 406 (1878)). It follows, therefore, that if compensation is provided by the courts (whether at the government's or the owner's behest) the flaw in the governmental action is cured, and there is no illegality (see 285 U.S. at 104).

B. Appellee's Notion Whereby Courts Would Have to Invalidate Legislation as the Measure of First Resort is Unsound and Contrary to Settled Principles of Constitutional Jurisprudence.

Nor did *Hurley* stop there; it went on to note:

> "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental

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[9] While in *Hurley* this was conceded, it is basic that validity of a law cannot be made dependent on a citizen's concession.

> ends, a court of equity acts with caution and only upon a clear showing that its intervention is necessary to prevent an irreparable injury." 285 U.S. at 104, fn. 3.

That observation, of course, puts its finger on the heart of pertinent policy considerations: it would be most improvident to structure a remedial rule that would require the courts *as a constitutional imperative* to strike down potentially vital governmental programs or regulatory schemes, merely because they impacted on an affected property owner so as to deprive him of a "stick" in his property rights "bundle". *The Regional Rail Reorganization Act Cases, supra,* provide an excellent example of the hazards inherent in Appellee's theory. Had such a theory been applied there (as indeed it was by the trial court, only to be rejected by this Court) the upshot would have been an instant destruction by the stroke of a judicial pen of a comprehensive congressional scheme, that would have left the most densely populated regions of the country without an effective rail transportation system, with eight major railroads in the throes of fragmented, individual bankruptcy proceedings, without a coherent system whereby to consolidate and make optimally useful all of their combined resources, still needed to maintain a national rail transportation system. While the case at bench does not present the Court with such calamitous prospects, it should not serve as a vehicle for the formulation of such a constitutional imperative that in future applications would compel judicial destruction of major regulatory schemes that some day may be vital to national survival.[10]

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[10] This is no hyperbole. Surely, it takes no claim of clairvoyant powers to visualize various governmental regulatory responses to the difficult problems of energy and inflation, for example, that in application may trench on constitutionally protected property rights. Should that occur, which would be better public policy: to require the benefited public to pay only for those limited private rights destroyed in the process of thus bettering the public condition, or to declare such programs invalid, with possibly calami-

As Mr. Chief Justice Marshall enduringly put it:

> 'The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch* v. *Maryland,* 4 Wheat. 316, 415 (1819).

Appellee's thesis, that would have the courts invalidate legislative enactments on an ongoing basis, as the primary remedy, ignores the socio-political gravity of judicial intervention in the workings of a tri-partite government. When the judiciary invalidates a legislative enactment it is a measure of last—not first—resort. The judicial power to invalidate is a historically rooted power of "strict necessity" (*Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568 (1947); *Spector Motor Service* v. *McLaughlin,* 323 U.S. 101, 105 (1944)), and is to be invoked only when "unavoidable" (*Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U.S. 129, 136 (1946)). See *Rescue Army* v. *Municipal Court, supra,* 331 U.S. at 571-572.

Appellee's theory seems preoccupied with short-range provincial concerns of local governmental interests. Its endorsement by the court below ignores the grave strain that judicial invalidation of legislation imposes on the

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tous consequences? As the Court of Claims astutely noted in *Drakes Bay Land Co.* v. *U.S.,* 424 F.2d 574, 587 (1970 Ct. Cl.), where the "convergent pressures" of desired governmental objectives and governmental unwillingness to pay for what is needed impact on the property owner caught in the middle, it is recourse to inverse condemnation that ". . . has saved the day in many another sticky situation".

social fabric. The holding below improvidently fashions a rule that would have the judiciary impose constraints on what the legislature may or may not enact, not in the historical context of major, earthshaking policy decisions that have confronted the nation on occasion and thereby made occasional legitimate claims on this Court's extraordinary power to invoke the organic law's grand scheme of checks and balances, but in terms of routine, day-in, day-out, case by case adjudications of purely local (usually political) decisions involving what in policy terms are but insignificant patches of land. Appellee's approach would make the judiciary an ongoing supervisor of the local legislative branch; it would make this Court the Supreme Board of Zoning Appeals.

Legislative approaches to solution of social problems are inherently more flexible and democratic, and judicial delimitations of the legislative power should be created rarely and cautiously. It is the legislatures that are called upon to provide immediate responses to social needs of the moment, and legislators are more readily responsive and accountable to the public will. This is as it should be in a democratically based society. To impose on such a system of governance a process of *ad hoc* judicial intervention of a ". . . largely negative character and [with] limited resources of enforcement" (*Rescue Army* v. *Municipal Court, supra,* 331 U.S. 571), would be most improvident. It seems by far the better policy to let the local legislators legislate, and when their enactments disregard the "just compensation" clause, and work a taking, it is singularly appropriate that they—as the branch of government responsible for the public purse, both in terms of revenues and expenditures—should be called upon to face up to the economic consequences of their own informed decision making, and (under appropriate circumstances) to pay for that (and only for that) which their solemn action took from a private owner. See *U.S. Trust Co.* v. *New Jersey,* 431 U.S. 1 at 29, fn. 27. In the long run, that approach is certain to enhance the quality

of legislative cost/benefit analyses, and to provide incentives to local governmental entities' clear recognition of the distinction between municipal necessities, social amenities, and outright luxuries.[11] This is a sound policy for rich and poor alike; yet it must be noted that such considerations are *a fortiori* pertinent here, when one recalls that San Diego is without a doubt one of the most prosperous communities in the state; it is already blessed with ample environmental resources, and can undoubtedly well afford any reasonable amount of parklands for its inhabitants.

In sum, sound, time-tested reasons of public policy respectful of the doctrine of separation of powers, counsel against the judiciary's, too-ready constitutional intervention in peculiarly local, often political, land use decisions on an ongoing daily basis. Legislatures know best what their constituencies need and what they can and cannot afford, and no sound reason appears why the courts should be called upon to assume a paternalistic role in this peculiarly legislative area of fiscal decision making.

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[11] Every municipality needs transportation, and every one owns automobiles for that reason. Yet no one has ever suggested that a municipality should have the power to exact Cadillacs from local car dealers when the municipal budget only allows for Fords, or to commandeer the free use of any citizen's car instead of buying one. No reason appears why similar reasoning should not apply to a municipality's real property needs and desires; as Mr. Justice Holmes observed in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), where a community has been so shortsighted as to fail to acquire enough for its needs [as determined by it], no reason appears why the courts should step in and supply the desired additional increment of social benefit gratis, any more than they supply any other community resources. Accord, *Griggs* v. *Allegheny County*, 369 U.S. 84, 89-90 (1962), (a community that constructs a bridge or airport without adequate approaches is not entitled to acquire them gratis by a claim that it is "regulating").

C. Obedience to the Constitution is No Less Worthy in Land Use Cases Than in Others.

It is often argued in cases of this type that regulatory bodies supposedly face a dilemma: they must regulate to meet the needs of the times, but they cannot tell when their edicts trench on constitutional rights. The implication is said to be that this asserted difficulty somehow earns them the right to become the beneficiaries of judicial rescue operations, to keep them from having to face the economic consequences of their own informed and pre-eminent decision making. This, with all due respect, is a false dilemma. If the regulators are astute enough to select and pursue their chosen governmental ends, they should also be responsible enough to select appropriate means. As this Court pointedly noted in *International Paper Co.* v. *United States,* 282 U.S. 399, 406 (1930):

> "The government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late."

Moreover, such arguments defy the Constitution's primacy. Consider this: every day, in some dark alley, a young policeman with limited experience and perhaps only a high school education, is being called upon to make instant decisions "on his feet" under potentially dangerous circumstances, that ultimately impact on the constitutional rights of the suspect that faces him. Yet, the courts have never hesitated to make it clear that the constitutionally protected rights of persons (including such suspects) are paramount, and therefore such policemen simply have to learn the contours of constitutionally permissible behavior, however difficult that may be. How then can it be seriously argued that a municipal regulatory establishment that enjoys the benefit of a full panoply of governmental powers and resources, aided by a staff of experts, receiving ample legal advice every step of the way, and

taking years to accomplish its regulatory objectives, cannot tell constitutional right from wrong and must be excused if it violates the constitutional rights of those it deals with? Such an image simply won't wash.

D. Constitutional Rights Need Protection Against Chilling by Governmental Overreaching.

It is also argued in such cases that if just compensation is required for egregious violation of constitutional property rights, that will "chill" even the benign exercise of regulatory powers. This, like most "parade of horribles" arguments, is a bit shopworn, and has already received short shrift from this Court.[12]

Moreover, this latter-day notion of "chilling' stands logic on its head. The concept of "chilling" rests on the idea that the rights protected by the Constitution are so precious that the courts protect them not only from outright invasions, but also from governmental activities that, though not crudely violative of the constitutional letter, would in reality tend to discourage individuals from availing themselves of those cherished rights. *That* is what "chilling" is all about.

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[12] ". . . [V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson* v. *Memphis*, 373 U.S. 526, 537 (1963). See *Gates* v. *Collier*, 501 F.2d 1291, 1319-1320 (1974, 5th Cir.). As one noted commentator put it:

> "At the slightest sign that judge-made law may move forward these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from the legal lore the year before much too long ago." Traynor, *No Magic Words Could Do It Justice*, 49 Cal. L. Rev. 615, 620 (1961).

To argue in favor of standing this concept of "chilling" on its head, and to demand that the constitutional values be narrowly circumscribed, lest those who would violate them be "chilled",[13] is simply an Orwellian inversion of the English language. The ethical and logical basis on which the concept of "chilling" rests means to protect the individual citizen from constitutional overreaching by the powerful government, not the other way around (history teaches that governments tend to take care of themselves). It is indeed supposed to provide disincentives *to the government* when it sets out on a constitutionally suspect path. Confronting a would-be constitutional violator with the prospect of unpleasant consequences is not "chilling"—it is deterrence from wrongdoing. See *Owen* v. *City of Independence, supra* [63 L. Ed. 2d at 694], *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 407-408 (1971), Harlan, J., concurring.

It would be an anomalous twist, contrary to the spirit and two centuries of American constitutional jurisprudence, to say that constitutional violations should be encouraged, lest their discouragement work a "chilling" of those who would set out on a path of collision with the nation's organic law and the precious values it enshrines. As this Court observed in *Owen,* the law should provide incentives such that errors in municipal judgment should be on the side of protection of citizens' constitutional rights, not in their derogation [63 L. Ed. 2d at 694].

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[13] It must be emphatically noted that no one on Appellee's side worries about any supposed "chilling" in the context of invalidation; it is only when it comes to having to pay just compensation that the bogus tocsin of "chilling" rings out. That tells volumes; the commitment of the parties making such arguments is thus *not* to the Constitution, but only to their self-interest (i.e., to a remedial legal structure that would make constitutional violations convenient, risk-free, and above all cheap).

E. Availability of the Just Compensation Remedy Makes Judicial Response to Takings More Capable of Doing Individual Justice to Both the Aggrieved Citizen and the Government.

Finally, beyond the above considerations, there are additional sound policy reasons that favor just compensation as a remedy. If the regulating entity effects a taking and confronts monetary liability, it has several ameliorating options available to it. It can, for example, in those situations where a full irreversible taking has not been effected, amend the regulation so as to avoid the continuing constitutional violation, while preserving its proper regulatory objectives to an optimal degree. See *U.S. Trust Co.* v. *New Jersey, supra,* 431 U.S. at 29-30. In such cases, this reduces liability to compensation for a temporary or partial taking. Even assuming the worst possible scenario from the regulating entity's point of view (i.e., those situations where the courts find the invasion of private property rights to be so egregious as to work a complete taking), the municipality does not lose money, but rather acquires a valuable asset [14] whose acquisition axiomatically betters the public condition. Moreover, if the municipality should decide that the asset thus acquired is indeed beyond its means (or, more accurately, beyond its *willingness* to acquire), it would have the further option of changing its mind and selling the land thus involuntarily acquired.[15]

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[14] In other words, for its money, the municipality acquires its equivalent in the form of land whose price is judicially determined as being its fair market value.

[15] This idea is hardly novel. It is now authorized in cases of so-called excess condemnation, whereby under some circumstances a public entity condemns more land that it will use for the public project (see Cal. Code Civ. Proc. § 1240.430). Such excess acquisition may occur because the government desires it (see *United States ex rel. TVA* v. *Welch*, 327 U.S. 546 (1946), *People* v. *Superior Court*, 68 Cal.2d 206, 65 Cal. Rptr. 342, 436 P.2d 342 (1968)), or because the owner does (see Cal. Gov't. Code § 7267.7, 42 U.S.C. § 4651(9)). Either way, resale of land acquired by the government

Indeed, Cal. Gov't. Code § 6952 expressly authorizes such resales of "open space".

It should go without saying, but unfortunately it is often the subject of contentious debate, that a finding of "taking" does *not* mean that the taking entity must acquire the full fee simple title to the property in question. What has been taken depends on the facts of each case; it may be a temporary taking,[16] a partial taking of only a subordinate property interest,[17] or, if the circumstances are egregious enough it may be a full taking.[18] But the governmental handwringing that one sees so often in these cases (of the tenor that even the slightest misstep over the constitutional line means an involuntary fee simple title purchase) is wholly without merit.

Such recognition of the proper role of compensation in the constitutional remedial scheme would further provide proper incentives and disincentives for municipal fine tun-

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is hardly unusual; indeed, it is an essential feature of urban redevelopment programs; see *Berman* v. *Parker*, 348 U.S. 26 (1954).

[16] *Lomarch Corp.* v. *City of Englewood*, 237 A.2d 81 (1968, N.J.)—regulation deemed a taking of one-year option to buy. *Keystone Associates* v. *State*, 371 N.Y.S. 2d 814 (1975, Ct. Cl.) rev'd. 389 N.Y.S. 2d 895 (1976, App. Div.), rev'd. and remanded 45 N.Y. 2d 894, 383 N.E. 2d 560 (1978, N.Y.)—regulation worked temporary taking. *Gordon* v. *City of Warren*, 579 F.2d 386, 387 (1978, 6th Cir.)—temporary taking. *Jones* v. *People*, 22 Cal. 3d 144, 148 Cal. Rptr. 640, 583 P.2d 165 (1978)—regulation worked temporary taking of access. *City of Austin* v. *Teague*, 570 S.W. 2d 389 (1978, Tex.)—regulatory activity worked a temporary taking; out-of-pocket losses compensated. Accord, *San Antonio River Authority* v. *Garret Bros.*, 528 S.W. 2d 266 (1975, Tex. Civ. App.).

[17] *Sneed* v. *County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963)—regulation effected taking of easement.

[18] *Benenson* v. *United States*, 548 F.2d 939 (1977, Ct. Cl.), *Drakes Bay Land Co.* v. *United States*, 424 F.2d 574 (1970, Ct. Cl.) and 459 F.2d 504, 505 (1972, Ct. Cl.).

ing of regulations so as to meet at once the desirable goals of accomplishment of basic regulatory objectives (albeit possibly not to the degree that may be desired by community environmentalist zealots; see Frieden, "The Environmental Protection Hustle" (1979, MIT Press), *passim*), while still affording protection to the rights of the regulated (see *U.S. Trust Co.* v. *New Jersey, supra,* 431 U.S. at 29-30). In contrast, the kind of rule sought by Appellee, that would allow an irresponsible governmental entity to have a go at confiscatory regulation, without fear of meaningful adverse consequences, save only an occasional judicial word of disapproval which might momentarily hurt the municipality's pride but leave it free to "regulate" anew (see *infra,* fn. 20), would be a positive disincentive to responsible governmental conduct.

Moreover, a finding of monetary liability, subject to such fiscally ameliorative measures would have the wholesome effect of removing the crushing burden of delay and uncertainty from the afflicted landowners (see *e.g.,* the travails of the landowner in *William Haas Co.* v. *San Francisco,* 605 F.2d 1117, 1119 (1979, 9th Cir.), while allowing the regulating entity a rational basis on which to assess, discount and forecast its exposure, and thereby reach informed and decisive cost/benefit conclusions when it sets out to impose onerous property regulations in pursuit of its democratically established social benefit goals.

F. Just Compensation Needs to be Retained as a Remedy Because Invalidation is Often Ineffective and is De Facto Not Available in California.

Only a few jurisdictions follow the rule of ordering that the owner be allowed to proceed with his project upon a showing that the challenged regulation is invalid (see *e.g., Sinclair Pipeline Co.* v. *Village of Richton Park,* 167 N.E. 2d 406, 411 (1960, Ill.). California, however, is *not* one of those jurisdictions. Not only does invalidation in California

mean that the supposed "victor" has to face his adversaries as adjudicators on remand, but that state's law goes even further. It grants the regulatory agency a *carte blanche* to simply change the regulation at any time, even while its validity is being litigated, or even after it has been found invalid.[19] Such a rule has manifest potential for abuse, and this has been unblushingly noted by municipal lawyers.[20]

It is a familiar phenomenon in California that a landowner who applies for a permit to use his land, in short order finds himself facing a flurry of changes in the local land use regulation scheme, transparently calculated to frustrate him. See *Toso* v. *City of Santa Barbara,* 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (1980), *Wm. C. Haas & Co.* v. *San Francisco,* 605 F.2d 1117 (1979, 9th Cir.).

Thus, it hardly comes as a surprise that there have been no reported invalidation cases [on grounds of taking] reported in California in almost two decades; the last one was *Hamer* v. *Town of Ross,* 59 Cal. 2d 776, 31 Cal. Rptr. 335, 283 P.2d 376 (1963).

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[19] Thus, a California landowner may find himself challenging a blatantly illegal regulation in court, only to discover that even as he is about to prevail, the regulation is changed, and he has to start all over again. See *Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 125, 109 Cal. Rptr. 799, 809, 514 P.2d 111 (1973).

[20] "If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby* v. *City of San Buenaventura,* 10 Cal.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment make it more reasonable, more restrictive, or whatever, and everybody starts over again." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation),* 38B NIMLO Municipal Law Review 175, 192 (1975).

Invalidation of overreaching land use regulations is often also an illusory remedy, because typically, a judgment of invalidation is followed by remand to the regulatory agency for reconsideration. This makes the process wholly dependent on the agency's good faith; or, it is like remanding the chickens to the care of the fox, with an admonition that he ought to be nicer this time. So far, only one state has formulated a clear rule that requires the regulatory agency to make it clear to the landowner what uses will be permitted, so that his permit application can be directed to realistic objectives,[21] instead of the all-too-common process of spending a fortune on plans and administrative proceedings that in the end produce a high-handed rejection of the tenor that we-don't-like-*this*-plan-but-perhaps-we-may-like-another.[22]

CONCLUSION

In the final analysis, both logic and human experience teach that societies can retain their attributes of freedom only when individual property rights are respected along with other human rights. The two are intertwined, and "[n]either could have meaning without the other". (*Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 552).

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[21] See *Spears* v. *Berle,* 422 N.Y.S. 2d 636, 640, fn. 4 (1979).

[22] Lest the Court think this concern hyperbolic, please note that in *Penn Central,* the landowner went through *three* building designs by Marcel Breuer, only to be turned down (see 438 U.S. at 116-118). Query: how many landowners can even begin to bear the likely expense of such endeavors? *A fortiori,* how many can do so when faced with a hostile regulatory body? Such excesses are by no means limited to affluent landowners; they can also be visited on "the little guy"—see *Brecciaroli* v. *Comm. of Environmental Protection,* 362 A. 2d 948 (1975, Conn.).

The government which is free to exercise unbridled power over its citizens' material wellbeing is for all practical purposes a government possessed of tyrannical powers, that has little need to impinge overtly on those citizens' other rights. A citizen who knows that his material security can be snuffed out by costly "regulations" is not likely to espouse unpopular views.

History also teaches that one simply cannot expect governmental power to restrain itself; the accuracy of Lord Acton's aphorism about the corrupting effects of power has been demonstrated time and again, with depressing reliability. Thus, to provide meaningful restraints on abusive growth of governmental power, the remedy afforded to aggrieved citizens must be effective. In the final analysis, the disincentive to wrongful conduct that money damages provide is appropriate and socially wholesome—especially in the context of egregious deprivation of constitutional rights.

The case at bench thus brings to the Court another instance suitable for invocation of the concepts of checks and balances. Here as elsewhere, a profession of noble ends should not serve as justification for employment of unconstitutional means. A government that would respond only to the self-serving call of politically popular, trendy notions abroad in its constituency, must still heed the stern call of accountability to the Constitution. In other words, popular cries uttered in the name of the environment, cannot, anymore than similar cries for "law and order", undo the idea that the Constitution and the rights protected by it—*including the rights of property*—are the supreme law of the land.

Amicus curiae respectfully urges that the judgment below be reversed.

Respectfully submitted,

GIDEON KANNER
1440 West Ninth Street
Los Angeles, California 90015
(213) 642-2951

Attorney for Amicus Curiae

Of Counsel:

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA
1776 F St., N.W.
Washington, D.C. 20006

THOMAS J. HOUSER
General Counsel

JANICE S. AMUNDSON
Assistant General Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellants,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The California Court of Appeals

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL FOREST PRODUCTS ASSOCIATION IN SUPPORT OF APPELLANTS

Richard S. Wasserstrom
1619 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Telephone (202) 797-5860

Attorney for Amicus Curiae National Forest Products Association

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INTEREST OF AMICUS CURIAE

The National Forest Products Association (''NFPA'') is a non-profit corporation founded to promote the conservation and renewal of forest resources and to improve forest utilization and forestry practices. It is a trade association which represents both individual member companies that manufacture solid wood products and regional forest products trade associations. One such regional trade association is the Western Wood Products Association which represents the owners of more than 3 million acres of privately owned commercial forest lands in the state of California where this action arose. NFPA's direct and indirect member companies account for some 45 percent of the wood and wood products sold annually in the United States and own approximately 30 million acres of commercial forest land.

NFPA also speaks on behalf of the private ''non-industrial'' forest landowners who own almost 300 million acres or 59 percent of the commercial forest land in the United States. ''Non-industrial'' forest landowners are those whose forested lands are capable of producing commercial forest products but who do not own manufacturing facilities. Characteristically, such landowners have small holdings — typically 40 acres — and manage their lands for a variety of purposes including recreation, aesthetics and conservation.

This brief is submitted by NFPA on behalf of appellant San Diego Gas & Electric Company (sometimes referred to as ''the landowner''). NFPA believes that the decision of the lower court, if allowed to stand, could, if applied in the context of forest land ownership, encourage overzealous land-use regulation of such areas and, consequently, deprive forest landowners of their property without the constitutionally requisite just compensation.

SUMMARY OF THE ARGUMENT

Application of the principles announced by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), leads to the conclusion that the City of San Diego's ("the city") regulatory actions, including "open space" designation of the landowner's parcel, zoning actions, and acquisition efforts, have completely frustrated the landowner's "investment-backed expectations" and have prohibited any reasonable beneficial use of the property. Accordingly, the city has taken the landowner's property within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution. Such a taking necessitates "just compensation," not mere judicial invalidation of the city's ordinances.

ARGUMENT

The City's Course of Conduct Constitutes a Taking of the Landowners' Property Within the Meaning of the Fifth and Fourteenth Amendments of the United States Constitution.

The appellant's brief and those of the other amici supporting appellants will present detailed discussions and analyses of the facts and applicable law and ably demonstrate that the California Court of Appeals erred and should be reversed. It would serve no useful purpose to present yet another detailed discussion of those matters. Instead, NFPA would underscore the significance of this Court's recent detailed analysis of the jurisprudence of taking in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and respectfully suggest that the application of those principles to this case compels the

conclusion that a compensable taking of property has, here, occurred. [1]

In *Penn Central*, this Court acknowledged that it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S. at 124. Instead, "whether a particular restriction will be rendered invalid by the Government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Id.* (citations omitted).

Nevertheless, this Court has identified two factors of "particular significance" in resolving the "essentially ad hoc, factual inquiries" involved in these cases. *Id.* First, the Court will look to "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* Second, the Court will look to the "character of the governmental action." *Id.*

With respect to the "character" criterion, although this Court has observed that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government," *Id.*, it has also stated that "we do not embrace the

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[1] Although this Court found, in *Penn Central*, that application of New York City's Landmarks Preservation Law to Penn Station did not constitute a "taking", NFPA shows, *infra*, that key differences between the New York law and San Diego's regulatory activities, as well as significant factual differences in the practical effects of such laws, as applied to the properties at issue, compel the conclusion that a "taking" has occured in the case at hand.

proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel.'' *Id.* at 123 n. 25.

Where, as here, physical control by the government is not necessary to secure the public use at issue, then physical control is not a very important factor in determining whether a taking has occurred. In the case at hand, the city engaged in its course of conduct to obtain the ''existence value'' of open space for its citizens and whatever aesthetic, social, or environmental benefits follow. Preservation of open space is easily accomplished without government occupation or control of a piece of property since it merely requires restrictive zoning and the related refusal to allow development as is evidenced here. In this circumstance, physical control is irrelevant, let alone dispositive of the ''taking'' question.

The true ''character'' of the city's action is better revealed by an examination of its effects on the landowner, discussed below, and by noting the city's abandoned acquisition efforts which preceded the series of regulatory actions at issue. The city cannot, now, be heard to say that its regulatory actions do not amount to a ''taking'' when it initially planned to acquire the landowner's property through condemnation proceedings and had initiated an unsuccessful bond issue to make that possible. The city's intentions from the very beginning of this transaction were acquisitive, as opposed to regulatory. The failure of the necessary bond issue cannot alter the underlying ''character of the governmental action.''

The more important inquiry, given the facts of this case, is whether ''the interference with appellant's property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain

[it].''' 438 U.S. at 136. This inquiry turns, in part, upon whether the regulatory actions at issue ''so frustrate distinct investment-backed expectations as to amount to a 'taking.''' *Id.* at 127.

The property at issue was acquired by the landowner in 1966 as an apparent future construction site for power generation facilities. A substantial portion of the property was then zoned for industrial purposes and would, therefore, have accommodated the landowner's underlying investment expectations. Finding of Fact Nos. 3, 6, Jurisdictional Statement Appendix A-2, A-3. The trial court below, found that prior to the city's regulatory actions ''the highest and best use of the property taken was for use as an industrial park and related buffer areas.'' *Id.* No. 27, A-7. The trial court also found that following the city's series of regulatory actions culminating in the designation of the landowners property as ''open space,'' ''*no* development could proceed on the property.'' [2] *Id.* Nos. 29 and 30, A-7, A-8 (emphasis added). On this record, then the purpose for which the landowner purchased the property at issue — ''the investment-backed expectations of the landowner'' — have been completely frustrated.

In addition, as a result of the city's actions, there appears to be no remaining beneficial use of this property which would allow the landowner to obtain ''a 'reasonable return' on its investment.'' 438 U.S. at 136. As the California trial court found, ''[in] light of the particular

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[2] This contrasts sharply with the situation in *Penn Central* where this Court upheld a New York City historic preservation law because, in part, New York City's refusal to permit construction of a 50 story office building above Penn Station did not, on that record, ''sugges[t] an intention to prohibit *any* construction above the Terminal.'' 438 U.S. at 137 (emphasis by the Court).

characteristics of the said property, there exists no practical beneficial or economic use of the said property designated as open space which is consistent with open space." Finding of Fact No. 30, Jurisdictional Statement Appendix A-8. Moreover, the trial court found that the entire property "is unmarketable in that no other person would be willing to purchase the property, and the property has at most a nominal fair market value." *Id.* No. 33.

The property cannot be farmed, no structure will be allowed, and it cannot be held for resale since it has no resale value. The only apparent remaining incident of property ownership enjoyed by the landowner is the privilege and responsibility of paying property taxes. Under these circumstances the city's actions have precluded any possibility of the landowner obtaining a reasonable return on its investment. This situation is in marked contrast to that in *Penn Central* where the land-use regulation there at issue not only permitted the landowner to continue the existing use of its land but, in addition, to obtain a reasonable return on its investment. 438 U.S. at 137.

Comparison of San Diego's regulatory actions with the New York City historic preservation law, considered in *Penn Central,* reveals another interesting circumstance: to whatever extent the Penn Central railroad was denied use of its developmental rights above its terminal, those rights were made transferable to other railroad parcels by specific provision of New York City law. *Id.* Accordingly, this Court concluded in, *Penn Central,* that the railroad's property rights had not there been abrogated since they were fully transferable to neighboring parcels. No such conclusion can be reached in connection with San Diego's land-use ordinances since they lack a "transfer" feature.

One final comparison between *Penn Central* and the case at hand is useful. In *Penn Central*, this Court emphasized that its "holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion." *Id.* at 138 n. 36. The Court then noted, with approval, New York City's concession at oral argument that "if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be 'economically viable,' appellants may obtain relief." *Id.*

Since appellant in this case cannot use its land for "its intended purposes" or in any other "gainful fashion," and since appellant's investment in this land is no longer "economically viable," NFPA urges this Court to conclude that the City of San Diego has "taken" the landowner's property within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution.

Once a "Taking" Has Been Found to Have Occurred, the United States Constitution Permits No Alternative But Monetary or Other Valuable Compensation in a Just Amount

The city contends, and the lower court has held, that "[u]nlike the person whose property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation." Rather, that individual must overturn the offensive regulation through litigation. *San Diego Gas & Electric Co. v. City of San Diego,* No. 16277, slip op. at 4 (Cal. Ct. App., June 26, 1979); Jurisdictional Statement Appendix G-4. The landowner disagrees.

At the risk of suggesting an apparently simplistic solution to a question involving fundamental constitutional

principles, NFPA, nonetheless, is pursuaded that one need look no further than the plain words of the Fifth Amendment to settle this matter: "[N]or shall private property be taken for public use, without just compensation." That phrase permits no other reading than that advanced by the landowner in this case. The Framers of the Constitution did not leave it to the City of San Diego or the California courts to fashion any other remedy. Although the California Court of Appeals may have determined that social and fiscal circumstances in that state make a different result desirable, that court is without authority to fashion such a remedy. Those localities, like San Diego, who would abuse fundamental constitutional principles of private property through adoption and application of unconstitutional zoning laws and regulations should not be allowed to choose the remedy available to the aggrieved landowner. The Framers of the Constitution wisely concluded over two centuries ago that governmental interference with citizens' enjoyment of private property rights was so serious a matter that it could not be remedied simply by subsequent restoration of such rights.

Although NFPA believes that this Court need go no further than the plain language of the Fifth Amendment, some examination of the practical implications of the lower court's "substitute remedy" might be useful. Restoration of complete enjoyment of one's property rights after protracted litigation can never compensate the aggrieved landowner for the loss of the use and benefit of his property during the period of litigation. So whether or not the landowner succeeds in setting aside an offensive land-use regulation, there will, under the "substitute remedy", always remain some period of time during which the landowner will have suffered a "taking", but for which no compensation will ever be available. Such property losses can extend over lengthy periods of time as evidenced by the four year course of litigation in this case.

In the context of forest management, such a delay in the exercise of certain incidents of property ownership can mean substantial permanent property loss. For example, assume *arguendo* that San Diego applied its open space ordinance to a forested area with the added restriction that commercial forest management practices, such as road construction and harvesting activities, were prohibited so as to preserve the area in a "natural" condition. Assume, too, that while the forest landowner was pursuing judicial remedies of the sort required by the lower court, the forest area is attacked by tree-destroying insects.

This latter assumption, unfortunately, is all too frequently the case during the course of forest land management. When it occurs, one common forestry practice is removal of the infested trees to contain the insect infestation. Such "salvage" operations require road construction to facilitate the removal of timber and the creation of sizable open areas surrounding the infested trees to act as a buffer against further spread of insect infestation.

But since the "salvage" harvest and the related road construction would affect the "natural" condition of the forest land, it would apparently be prohibited by the open space ordinance we have hypothesized. Yet, without the ability to protect forest land from insect attack through application of common silvicultural techniques, the forest landowner would have lost a sizable portion of his investment — without hope of future compensation — while he was litigating the propriety of this hypothetical "open space" ordinance.

There are additional reasons for avoiding the lower court's "substitute remedy". First, the California Court of Appeals incorrectly assumed that all landowners have the means to engage in protracted litigation with governmental

entities that have at their disposal publicly paid attorneys. Second, the lower court incorrectly concluded that the threat of judicial intervention is a sufficient check on a regulator's inclination to obtain, by zoning ordinance, what should be acquired by condemnation.

The lower court's denial of compensation even in the event of an unconstitutional exercise of police power affects *all* landowners in this country not just corporations of substantial means. The most common class of United States landowner is probably the residential property owner. Such individuals are of a variety of economic means. As a matter of intuition, it appears safe to conclude that most homeowners are not in a position to maintain protracted litigation against governmental entities that would engage in unconstitutional exercises of police power. But even if a particular landowner possessed the means to litigate, no principle of constitutional law, of which NFPA is aware, holds that a constitutional right may be withheld because a claimant is of substantial means.

The lower court's concern that land use planners would be inhibited in performing their duties should courts allow inverse condemnation proceedings is misplaced as it ignores the recent proliferation of federal, state, and local regulations in the face of numerous legal challenges. In NFPA's experience, government regulators have come to view the possibility of litigation as merely another hurdle to overcome during the ordinary course of regulation promulgation. By analogy, one need only look to the seemingly geometric growth of the number of *Federal Register* pages published every year to understand that the threat of litigation, even by large corporations of substantial means, does little to discourage regulatory excess. In short, the California Court of Appeals has stricken the balance on the wrong side. It is the individual landowner in these times of burgeoning government

regulation that needs protection from the regulator, not vice versa.

CONCLUSION

For the foregoing reasons, NFPA urges this Court to conclude that (1) the city's course of conduct constitutes a taking of the landowners property; and (2) that such takings require monetary or other valuable compensation. Accordingly, the ruling of the California Court of Appeals should be reversed.

Respectfully submitted,

RICHARD S. WASSERSTROM
1619 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Counsel for Amicus Curiae

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No. 79-678

IN THE

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OCTOBER TERM, 1980

SAN DIEGO GAS & ELECTRIC CO.,
Appellant,

v.

CITY OF SAN DIEGO, *et al.*,
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On Appeal from the Court of Appeal
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BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL ASSOCIATION OF COUNTY PLANNING DIRECTORS, NATIONAL WILDLIFE FEDERATION, PRESERVATION ACTION, AND NATIONAL PARKS AND CONSERVATION ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEES

PETER VAN N. LOCKWOOD
CAPLIN & DRYSDALE
1101 Seventeenth Street, N.W.
Washington, D.C. 20036
Attorney for Amici Curiae

Of Counsel:

STEPHEN N. DENNIS
EDWARD P. THOMPSON, JR.
Washington, D.C.

October 1980

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QUESTION PRESENTED

Whether, when a regulatory ordinance not intended to condemn property is found to burden property unconstitutionally, state courts must award damages or whether they instead may award appropriate declaratory or injunctive relief to insure that the property involved is not impermissibly burdened?

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 42(2), the above-listed organizations file this brief as Amici Curiae in support of Appellees. Letters of consent from counsel for the parties have been filed with the Clerk.

Amici are concerned with the protection and promotion of the natural and built environment and with land use regulation and planning. Amici have a combined U.S. member-

ship of nearly three million, and have a major interest in the encouragement of environmentally and economically sound land use policies. A more detailed description of each Amicus appears in Appendix A to this brief.

SUMMARY OF ARGUMENT

Amici believe that no "taking" has occurred in this case, and fully support the arguments made on that issue by Amici Curiae Conservation Foundation *et al.* in their brief. In the event that, as Amici believe appropriate, this Court affirms the decision below on the "taking" issue, consideration of the remedy issue will be unnecessary.

Amici submit that the decision of the California court on the remedy issue should be affirmed for a number of important reasons.

First, there is no precedent for an "inverse condemnation" damage remedy in the context of an overly burdensome regulatory scheme.

(a) In no case has this Court ever upheld an award of damages on the theory of "inverse condemnation" by a regulation. Instead, the uniform result has been to tell the agency involved it could not proceed unless it paid compensation. *E.g., Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979) (regulation found to be "taking" and enforcement of Corps of Engineer's order denied); *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922) (regulation found unconstitutional and enforcement enjoined). The supposedly contrary cases cited by the Appellant and its supporters uniformly hold that where the United States intends to pay for a legislative scheme if necessary, and the Tucker Act is available for a damage remedy, an injunction will not issue. These cases thus support judicial deference to the legislative decision as to whether to regulate or condemn, but surely do not suggest that damage remedies are appropriate against the legislative will.

(b) Virtually all the other states which have specifically considered this issue have concluded, as has California, that in circumstances similar to those here no "inverse condemnation" damage remedy is available for an unconstitutionally burdensome regulation. Thus, the California court's decision is fully consistent with the position of the highest courts in most states that have considered the question. *See, e.g., Eck* v. *City of Bismarck,* 283 N.W.2d 193, 200 (N.D. 1979); *Holaway* v. *City of Pipestone,* 269 N.W.2d 28 (Minn. 1978); *Fred F. French Investing Co.* v. *City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, *appeal dismissed,* 429 U.S. 990 (1976).

(c) *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971); *Davis* v. *Passman,* 442 U.S. 228 (1979); and *Carlson* v. *Green,* 100 S. Ct. 1468 (1980), do not support a constitutional damage remedy here. Those cases indicate that a constitutional damage remedy may be implied where injunctive relief would be futile and no considerations of federal-state relations or other "special factors" are involved. In the present case, however, injunctive relief is entirely adequate. Since the gist of the complaint is failure to allow development, an order striking down an ordinance and requiring that a project proceed will fully vindicate the Appellant's rights. *See Pamel Corp.* v. *Puerto Rico Highway Authority,* 621 F.2d 33, 36 (1st Cir. 1980). Moreover, as discussed below, land use regulations involve precisely those "special factors" and "financial policy" considerations *Bivens* and *Carlson* indicate are reasons to avoid a damage remedy.

Second, implying a damage remedy would significantly interfere with the relationship between the courts and the legislative branch, especially at the state and local level. *See National League of Cities* v. *Usery,* 426 U.S. 833 (1976). This Court has repeatedly held that the state's legislative declaration of the public interest is "well-nigh conclusive" because state and local governmental leglislative bodies

are far better situated to determine the "necessity, character and degree of regulation," if any, which is appropriate in a particular circumstance. *Berman* v. *Parker,* 348 U.S. 26, 32 (1954); *Gorieb* v. *Fox,* 274 U.S. 603, 608 (1927). For that reason, this Court has consistently deferred to the legislature on the provision of remedies, particularly where they involve major financial commitments. *Compare Bivens* v. *Six Unknown Named Agents, supra; Dugan* v. *Rank,* 372 U.S. 609 (1963).

In the present case, Appellant seeks nothing less than a court declaration that the City of San Diego has purchased its property despite the fact that San Diego had no intent to do so and, indeed, that the California enabling legislation under which San Diego acted specifically precludes the City from using its open space zoning power to burden property unconstitutionally. Such a result would be unprecedented, unwarranted, and unwise.

Third, a constitutional damage remedy would cause wholesale disruption of government resources and greatly inhibit legitimate regulation, particularly, but not exclusively, in the land use area.

(a) The remedy Appellant seeks would likely cause staggering financial dislocation to already overburdened government units in instances when they have not knowingly committed their limited resources. For example, in *Horizon Adirondack Corp.* v. *State of New York,* 88 Misc. 2d 619, 388 N.Y.S.2d 235 (1976), the court rejected an "inverse condemnation" damage claim in part because of the tremendous financial impact—over $500 million in total—which could have resulted from such a decision. Moreover, the same problems would extend well beyond the land use area. Thus, under the rule sought by Appellants, had this Court not rejected in *Andrus* v. *Allard,* 444 U.S. 51 (1979), a claim that the impact of the regulatory provisions of the Migratory Bird Treaty Act upon sellers of Indian artifacts containing certain bird feathers was a

"taking," presumably Congress would have purchased all the Indian artifacts in the United States containing bird feathers, surely not what Congress had in mind.

(b) The effect of a mandatory damage remedy will be to discourage legitimate regulation, particularly since determining in advance whether a regulatory scheme will be held overburdensome as applied in every particular instance is often impossible. This Court's decisions have noted the importance of avoiding this type of impact on the other branches of government. *Compare Scheuer* v. *Rhodes,* 416 U.S. 232, 241 (1974); *Butz* v. *Economou,* 438 U.S. 478, 503, 506 (1978).

For all these reasons, the decision of the California court should be affirmed.

ARGUMENT

Amici believe that no "taking" has occurred in this case, and fully support the arguments made on that issue by Amici Curiae Conservation Foundation *et al.* in their brief. In the event that, as Amici believe appropriate, this Court affirms the decision below on the "taking" issue, consideration of the remedy issue will be unnecessary.

A. The Precedents Do Not Support an "Inverse Condemnation" Damage Remedy

1. *There is no precedent and no foundation in this Court's precedents for requiring a damage remedy.* Over the years this Court has considered the constitutionality of regulatory schemes in a number of cases in which the owner of real or personal property has contended that the regulation on its face or as applied was unconstitutionally burdensome. From time to time the Court has held that a particular regulation went "too far" and thus constituted a "taking." *E.g., Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979); *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922).

Appellants (App. Br. at 39-41) and their supporters (*e.g.*, National Forest Products Association ("NFPA") Br. at 7-9) quote these cases, a number of eminent domain cases, and the language of the just compensation clause as support for a damage remedy. They conclude that the use of the term "taking" is a recognition that an overly burdensome regulation is equivalent to an exercise of the eminent domain power for which the state simply omitted to provide the payment required by the Just Compensation Clause. Appellant argues that the courts should remedy this defect and enforce the regulation as the equivalent of an exercise of eminent domain. (App. Br. at 19, 41).

This argument is little more than a play on words. As has been regularly recognized, the use of the term "taking" in this Court's decisions, *Pennsylvania Coal* v. *Mahon, supra,* included, is simply a shorthand for an impermissible use of the police power, not a reference to the eminent domain power. *See Pamel Corp.* v. *Puerto Rico Highway Authority,* 621 F.2d 33 (1st Cir. 1980); *Fred F. French Investing Co.* v. *City of New York,* 39 N.Y.2d 587, 385 N.Y.S. 2d 5, 350 N.E.2d 381, *appeal dismissed,* 429 U.S. 990 (1976); Nichols, *Eminent Domain* § 1.42(1), at 1-116, 1-121 (rev. 3d ed. 1979). As the First Circuit quite correctly observed in *Pamel*:

> "A zoning regulation that exceeds the permissible bounds of the police power does not in reality confiscate the property, but regulates with oppressive or arbitrary severity . . . . [The] court does not declare that an offensive zoning regulation has taken the property, but that the government cannot impose the restriction without formally paying for it." 621 F.2d at 35-36.

In no case has this Court ever held that, where legislation intended only to regulate did unconstitutionally overburden property, the governmental agency involved must proceed with its regulatory plans and pay compensation. Indeed, the uniform result has been to tell the agency involved

that it could not proceed in the absence of compensation. Thus, the governmental unit has been required to abandon its regulatory scheme and to institute eminent domain proceedings if it chose to do so. This Court's recent decision in *Kaiser Aetna, supra,* reached exactly that conclusion.[1]

Amicus National Association of Manufacturers ("NAM"), however, claims to have found several decisions of this Court which "are well nigh dispositive" support for damages as the proper remedy of owners of "taken" property. (NAM Br. at 10). In fact, the cases cited by the NAM stand for no such proposition.[2] They are cases in which

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[1] Kaiser Aetna had dredged a channel from its private pond to the ocean. The Army Corps of Engineers claimed that as a result the pond had become part of the navigable waters of the United States so that Kaiser Aetna could no longer preclude public access to the pond. This Court held that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co.* v. *Mahon.*" 444 U.S. at 178. Having so concluded, it is noteworthy that this Court did *not* order the Corps of Engineers to make payment to Kaiser Aetna. Quite the contrary, the Court held that the government could not require public access to the pond without first bringing a separate proceeding in eminent domain and paying just compensation. 444 U.S. at 180.

[2] The cases cited by the NAM are *Hurley* v. *Kincaid*, 285 U.S. 95 (1932) (Mississippi River Flood Control Act, 45 Stat. 534, which provided for construction of levees and floodways, could not be enjoined pending compensation due, if any, since the Act authorized condemnation of flowage right over Kincaid's lands; sole remedy is the Tucker Act, 28 U.S.C. § 1491); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Fresno* v. *California*, 372 U.S. 627 (1963); and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (all involving the California Central Valley Project initially established by the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, in which Congress specifically provided for the purchase of water rights and authorized millions of dollars for such purchase by way of appropriation; not surprisingly, the Court concluded that the Tucker Act and the Reclamation Act, 43 U.S.C. §§ 371 *et seq.*, authorized the award of compensation for any "taking" and in-

this Court held that where the United States intends to carry out a congressional program and to pay any required compensation, the Tucker Act authorizes payment and injunctive relief is therefore not appropriate. Indeed, it is noteworthy that in each of these cases the United States argued in this Court that it was determined to carry out the plan involved and that it would pay compensation rather than have the regulatory scheme set aside. Thus, these cases actually stand for the proposition, discussed in detail below, that the courts must accord to the legislative branch the right to determine whether to proceed with the plan involved and pay compensation or drop the scheme.

2. *Virtually all state courts to consider the issue have reached the same conclusion as the California courts.* A number of the Appellant's supporters attempt to portray the California decision in the present case as a sport, out of touch with the decisions in state courts elsewhere in the country. (*E.g.*, National Association of Homebuilders ("NAHB") Br. at 25-28; NAM Br. at 19.)[3]

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junctive relief would be inappropriate); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (where Congress intended to reorganize the northeastern railroads under the Rail Act, 45 U.S.C. §§ 701 *et seq.*, the Tucker Act provides a just compensation remedy for any "taking" of property and the reorganization cannot be enjoined).

[3] While for the reasons set forth in this brief Amici believe the California courts are correct, there is support for the proposition that a uniform remedy is not required:

> "Remedies X and Y may each satisfy the minimum requirements of the Constitution in the degree to which they implement a Constitutional right. If so, the Constitution permits a choice." A. Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118 (1969).

See also A. Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181, 182-93 (1969); *cf. Baker* v. *Carr*, 369 U.S. 186, 236-37 (1962); *Pruneyard Shopping Center* v. *Robins*, 100 S. Ct. 2035 (1980) (California may provide limits on property rights different from the federal Constitution).

In fact, however, virtually all the state courts to consider the issue have taken the same view as California. A number of the recent state court holdings disallowing "inverse condemnation" damages as a general rule for allegedly overburdensome land use regulation are discussed in the note below.[4] Thus, in most other states, as in California, the rule is that injunctive or declaratory orders of one type

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[4] See the following cases:

Eck v. *City of Bismarck*, 283 N.W.2d 193, 201 (N.D. 1979) (a zoning ordinance limiting plaintiff's land to agricultural uses precluded a planned residential development; the court held that "absent a land-use regulation exceedingly onerous on its face, actual physical conduct inconsistent with the property rights of the landowner, or governmental precondemnation regulatory activity designed to facilitate subsequent eminent-domain proceedings, an action for 'inverse condemnation' [*i.e.*, damages] is inappropriate to challenge the validity of a zoning ordinance");

Gary D. Reihart, Inc. v. *Township of Carroll*, 409 A.2d 1167 (Pa. 1979) (where property owner seeks to establish land use restrictions as unreasonable, injunctive and declaratory relief are available; there is no damage remedy for the supposed "taking");

Holaway v. *City of Pipestone*, 269 N.W.2d 28, 30-31 (Minn. 1978) (a downzoning case in which the court concluded that "a writ ordering the initiation of condemnation proceedings is an inappropriate remedy to grant to a plaintiff who succeeds in establishing that a zoning ordinance has strayed beyond mere regulation. Instead, we think such an ordinance should be declared invalid and its enforcement enjoined");

Davis v. *Pima County*, 121 Ariz. 343, 590 P.2d 459, 460 (Ariz. App. 1978), *cert. denied*, 442 U.S. 942 (1979) (county refused to rezone property from rural to residential and the plaintiff sought both declaratory relief and damages; the court held that the "sole remedy" for an overburdensome zoning regulation was "the undoing of the wrongful legislation and not money damages");

Fred F. French Investing Co. v. *City of New York, supra* (ordinance severely restricted use of Manhattan property; the court held the regulation invalid and struck it down but specifically refused to allow a damages remedy);

Gold Run, Ltd. v. *Board of County Commissioners*, 554 P.2d 317, 318-19 (Colo. App. 1976) (county refused to rezone mountain

or another are the only appropriate relief in the usual case where a zoning or land use restriction is claimed to be unconstitutional on its face or as applied.

Of course, in California as elsewhere damage awards are available for physical "takings" and attempts to depress the market price for future condemnation. *See, e.g., Klopping* v. *City of Whittier*, 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972); *Pan Pacific Properties, Inc.* v. *County of Santa Cruz*, 81 Cal. App. 3d 244, 254, 146 Cal. Rptr. 428, 434-35 (1978).[5] No such claims are made here.

3. *Bivens does not suggest the appropriateness of a damage remedy.* In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court implied a damage remedy under the Fourth Amendment. More recently in *Carlson* v. *Green*, 100 S. Ct. 1468 (1980), and *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court implied damage remedies under the Eighth Amendment for failure to provide timely medical treatment to a prisoner and under the Fifth Amendment for sex discrimination. However, in *Lake Country*

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property from agricultural to residential and the court held that declaratory relief or certiorari review were the only remedies);

Mailman Development Corp. v. *City of Hollywood*, 286 So.2d 614, 615 (Fla. App. 1973), *cert. denied*, 419 U.S. 844 (1974) (city downzoned property to reduce the number of residential units by nearly 60 percent; court held "inverse condemnation" [*i.e.*, damages] was not allowed as a remedy even if the zoning ordinance were invalid); and

Visidor Corporation v. *Borough of Cliffside Park*, 48 N.J. 214, 225 A.2d 105 (1966), *cert. denied*, 386 U.S. 972 (1967) (city regulation limiting access to tavern can be attacked in injunctive suit but damages are not available).

[5] A number of Appellant's supporters argue that the California courts have "absolutely" prohibited damage awards in all cases, and that even if damages are not generally appropriate, this "absolutist" approach violates the notion that "taking" cases must be decided on a case-by-case basis. (*E.g.*, NAHB Br. at 23-24.) As discussed above this contention is simply based on an incorrect premise.

Estates, Inc. v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 398-400 (1979), and *Agins* v. *City of Tiburon,* 100 S. Ct. 2138 (1980), this Court left open the question as to whether there is such a constitutional damage remedy for an overly burdensome land use regulation.

Amici believe that the logic of *Bivens, Passman* and *Carlson* makes it clear that the damage remedy allowed in those cases would be inappropriate here.

First, damages were the only possible remedy in those cases. Bivens had supposedly been unlawfully arrested and his house ransacked by federal agents. Davis claimed that she was fired by ex-Congressman Passman solely on the basis of her sex. Green's son allegedly died because federal prison officials did not bother to provide timely medical treatment. Injunctive or other prospective relief was obviously of no use, since the damage to Bivens and Green's son had all taken place and Davis could not be reinstated because Passman was no longer a Congressman. As the Court noted in *Davis*:

> "[T]here are available no other alternative forms of judicial relief. For Davis, as for Bivens, 'it is damages or nothing.'" *Davis* v. *Passman, supra,* 442 U.S. 245.

See also Butz v. *Economou,* 438 U.S. 478, 504-05 (1978).

In the present case, on the other hand, the gist of the claim is that Appellant has been wrongfully precluded from industrial development on its property. This Court has already ruled that delays in development because of the regulatory process are "incidents of ownership" for which no remedy is appropriate and cannot amount to a "taking." *Agins* v. *City of Tiburon, supra,* 100 S. Ct. at 2142-43 n.9 (1980). Thus, injunctive relief ordering San Diego to allow Appellant to develop its property in accordance with the earlier zoning would be a full remedy. Moreover, injunctive relief is typically all that is needed in land use regulation cases. *See Pamel Corp.* v. *Puerto Rico Highway Authority,*

supra, 621 F.2d at 36; Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan. L. Rev. 1439, 1452 (1974).[6]

Appellant and its supporters contend that injunctive relief is not useful because, if the courts strike down a regulation, under *Selby Realty Co.* v. *City of San Buenaventura*, 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973), the municipality may simply enact another regulation and start over. (App. Br. at 43-44; NAM Br. at 21). However,

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[6] Although they do not specifically rely on *Bivens*, *Passman*, or *Carlson*, Appellant and its supporters claim that damages should be allowed as a remedy because, at least in California, there is no other remedy available. For example, the NAM cites a series of cases which it claims show that California courts—both state and federal—have upheld against invalidation regulations which Appellant and its supporters insist are outrageously burdensome. (NAM Br. at 6 n.6, 20-22). Indeed, the NAM claims that no land use regulation has been invalidated by the California state courts in the past 20 years. (NAM Br. at 21). But the heart of the matter is that in the various cases cited by Appellant's supporters the California courts have found there was no "taking." If those cases are wrongly decided, the decisions should be reviewed and reversed. But the fact that California courts refuse to find "takings" where Appellant and its supporters feel they should obviously furnishes no ground for the creation of a damage remedy. If the California courts find there is no "taking," Appellant and its friends will have no relief whatever remedies are theoretically available.

Moreover, the NAM has its facts wrong. While Amici have not attempted a systematic survey of all California cases on land use regulation, Amici are aware of at least five cases within the past seven years in which the Supreme Court of California has struck down zoning and land use regulations as applied or otherwise ruled in favor of property owners in land use disputes. *See Furey* v. *City of Sacramento*, 24 Cal. 3d 862, 157 Cal. Rptr. 684, 598 P.2d 844 (1979), *cert. denied*, 100 S. Ct. 476 (1979); *Youngblood* v. *Board of Supervisors*, 22 Cal. App. 3d 644, 150 Cal. Rptr. 242, 586 P.2d 556 (1978); *City of Imperial* v. *McDougal*, 19 Cal. 3d 505, 138 Cal. Rptr. 472, 564 P.2d 14 (1977); *San Diego Coast Regional Commission* v. *See the Sea, Ltd.*, 9 Cal. 3d 888, 109 Cal. Rptr. 377, 513 P.2d 129 (1973); *Selby Realty Co.* v. *City of San Buenaventura*, 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973).

the California courts have recognized that in appropriate instances injunctive relief includes not only striking down the regulation involved but ordering the agency to allow the proposed development. *See, e.g., Furey* v. *City of Sacramento, supra.*

Second, in *Bivens, Passman* and *Carlson* there were no considerations of federal-state relations since the defendants were all federal officials. *Compare Carlson* v. *Green, supra,* 100 S. Ct. at 1475 n.11. As discussed in detail below, those concerns are significant here.

Third, this Court in *Carlson* v. *Green, supra,* specifically recognized that no damage cause of action should be recognized where there are "special factors counseling hesitation in the absence of affirmative action by Congress." 100 S. Ct. at 1472. Where damages are sought for state or local land use regulatory actions there are a number of "special factors", specifically including, as discussed below, the "fiscal policy" questions which this Court suggested in *Bivens* could be an important reason not to allow a damage remedy. 403 U.S. at 396.

B. Implying a Damage Remedy Would Interfere with the Relationship Between Federal and State Authorities and Between the Courts and the Legislative Branch

In our system of government, the primary responsibility for determining what measures will promote the public welfare lies with the legislative branch and the courts pay substantial deference to the legislative judgment. Thus, this Court long ago explained, referring specifically to land use restrictions, that:

> "State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." *Gorieb* v. *Fox,* 274 U.S. 603, 608 (1927).

For that reason, the state's legislative declaration of what the public interest requires is "well-nigh conclusive." *Berman* v. *Parker*, 348 U.S. 26, 32 (1954). *See also Village of Euclid* v. *Ambler Realty Co., supra*, 272 U.S. at 388; *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328 (1927) ("[T]he settled rule of this Court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.").[7]

In the present case—and in all those cases like it in which federal, state, or local governments have attempted to regulate—the Appellant and its supporters insist that this Court should substitute its judgment for that of the legislative branch as to whether to regulate or condemn. Appellant's supporters argue that, as they see it, invalidation of an overburdensome land use regulation is more disruptive of the relations between the judicial and other branches than is the award of damages. (*E.g.*, NAM Br. at 12-14). But the cases they cite in support of this proposition (*see* n.3, *supra*) recognize that it is an unwarranted intrusion into the legislative sphere for the courts to strike down legislation where the legislative branch has made a determination to proceed, with payment if necessary. It would be just as improper, where a legislature has decided or assumed that the remedy for a regulation which went "too far" would be invalidation, for the courts to tell the legislative branch that, much to the legislature's surprise, it has in fact used its eminent domain power and must pay damages.

Of course, it is the province of this Court and the lower courts to tell legislators when their regulatory schemes have overstepped permissible bounds and unduly interfered with protected private property rights. But as the

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[7] "The statement of the rule in *Zahn* remains viable today." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 514 n.1 (1977) (Stevens, J., concurring).

cases discussed earlier make clear, the Court has uniformly deferred to the legislative judgment as to appropriate remedy.

Thus, as the Supreme Court of Pennsylvania recently pointed out in *Gary D. Reihart, Inc.* v. *Township of Carroll*, 409 A.2d 1167 (Pa. 1979), in refusing to permit a damage remedy for an alleged "taking" caused by unduly restrictive land use regulations when the state legislature had provided only remedies for injunctive and declaratory relief:

> "These [injunctive] procedures are, in the Legislature's judgment, the best means of balancing the interests of municipalities with those of land owners and others. To permit actions for damages in disputes over local subdivision planning, as Appellant urges, would surely undermine the Legislature's established procedures for resolution of controversies involving land use and development." 409 A.2d at 1170.

The result sought by the Appellant is particularly troublesome where state and local government is concerned. For example, in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court struck down a congressional attempt to control state legislative decisions regarding payment of state and local government employees because of the interference with State and local government policy decisions:

> "Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." 426 U.S. at 847.

This is precisely what the Appellants would have the Court do here.

As the First Circuit recently noted in *Pamel Corp.* v. *Puerto Rico Highway Authority, supra*:

> "Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion

> into the states' traditional domains of property law and land use policy . . . [O]nce the Constitutional line has been drawn, the state or local authority administering the complex structure of land use controls should be free to decide whether the expected benefits from the restriction are worth the cost of the required compensation." 621 F.2d at 36.

The result urged by Appellant would be particularly unreasonable in the present case since the State of California has specifically forbidden cities such as San Diego from exercising the state-granted open space zoning ordinance power to "take" property by overregulation. Cal. Government Code § 65912. Thus, the California legislature has made a judgment that the zoning ordinance it has required cities to enact shall be within the permissible scope of the police power. It would be a unique step, indeed, for this Court to tell the City of San Diego that, because its open space zoning has overstepped the permissible bounds of regulation, it has bought the Appellant's property despite the specific legislative judgment not to use the eminent domain power in this instance. *Compare United States* v. *Clarke,* 100 S. Ct. 1127 (1980) (congressional decision to limit acquisition power to direct condemnation suits precludes "inverse condemnation" remedy).

The necessary conclusion is that a court may properly strike down a regulation which would be an invalid exercise of the police power because of its undue burden, but it may not transmogrify a police power regulation into an exercise of eminent domain when the legislative branch never intended to pay compensation.

C. Adopting a Damage Remedy Would Cause Wholesale Dislocation of Public Resources and Preclude Effective Governmental Regulation

Over the past 50 years, this Court has regularly sustained zoning and land use regulations and has repeatedly

recognized the validity of comprehensive land use planning for a broad variety of environmentally related purposes. *E.g., Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 129 (1978); *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974).[8]

In light of the decisions of this Court, land use regulations have been acted by federal,[9] state and local authorities. Thus, every state has adopted zoning enabling legislation and almost every municipality in the United States has a zoning law of greater or lesser comprehensiveness. Anderson, *American Law of Zoning* § 2.21, at 62 (2d ed. 1976); 8 McQuillen, *The Law of Municipal Corporations,* § 25.04, at 10 (3d ed. 1976). In addition, many states and literally hundreds of cities and towns have enacted nonzoning land use regulations such as floodplain control, wetland and shoreland protection, coastal zone management, and historic preservation regulations. *See* J.A. Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking,* 57 Minn. L. Rev. 1, 2 and 2 n.1 (1972); *Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 107.

The effect of a holding which now subjects every governmental agency that adopts or has adopted such regulations to the possibility of damages every time a court

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[8] "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." 416 U.S. at 9.

[9] Among the federal programs are National Flood Insurance Program, 42 U.S.C. §§ 4001 *et seq.;* Federal Water Pollution Control Act, 33 U.S.C. § 1288 (land use controls) and § 1344 (wetlands controls); and Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 *et seq. See* F. Bosselman, *Federal Land Use Regulation* (1977).

should find a regulation as applied in some particular situation oversteps constitutional bounds has staggering implications for governmental financial soundness and regulatory processes.

1. *A damage remedy threatens financial disaster.* Virtually every commentator on the subject has noted the potential financial consequences that would arise from this Court's requiring an "inverse condemnation" damage remedy. While forcing the City of San Diego in this case to pay more than $3 million it never intended to spend for property it never wanted to buy may not itself involve vast sums of money, the implications of such a decision are enormous. A few examples make the point quite clearly.

In *Horizon Adirondack Corp.* v. *State of New York,* 88 Misc. 2d 619, 388 N.Y.S.2d 235 (1976), New York had established an Adirondack Park Agency to regulate some 3.6 million acres of private land in the Adirondack Mountains. A land developer which owned 26,000 acres filed an "inverse condemnation" action seeking $35 million for its land on the theory that the Agency's regulations constituted a "taking." The New York court dismissed the case on the ground that "inverse condemnation" was not an appropriate remedy, noting that an award of damages under these circumstances would "have staggering implications upon the state budget and tax system . . . ." 88 Misc. at 630, 388 N.Y.S.2d at 244. Indeed, a damage award could have ultimately resulted in an unexpected liability of some $500 million to the State of New York.

In *Virginia Surface Mining and Reclamation Ass'n* v. *Andrus,* 483 F. Supp. 425 (W.D. Va. 1980), now pending before this Court, the trial judge held that the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 *et seq.,* constituted a "taking." Under the rule sought by Appellant, if this Court affirms presumably the United States will own all the nation's strip mines, with the only remaining question how many billions of dollars

the courts should award the former owners to pay them for the purchase of their property by what Congress thought was a regulatory scheme.

These are but examples of the kind of financial disasters which lie ahead if the Appellant's claims are accepted. Moreover, the impact upon the public treasury would not be limited to land use regulations, broad as that financial liability might be, because there is no difference in legal effect between a "taking" by a land use regulation and by other kinds of regulations.

For example, in *Andrus* v. *Allard,* 444 U.S. 51 (1979), the plaintiff brought suit to challenge the congressional regulatory scheme embodied in the Eagle Protection Act and Migratory Bird Treaty Act, 16 U.S.C. §§ 668 and 703 *et seq.,* and the regulations thereunder, which prohibited sale, trade, or barter of certain migratory birds and eagles, or parts thereof, even though the birds were lawfully acquired prior to the legislation. Plaintiffs, who were in the business of purchasing and selling Indian artifacts containing bird feathers, claimed that the effect of the statute was to "take" their property without just compensaion. On the merits, this Court found that no "taking" had occurred and that the regulatory scheme was not constitutionally defective. However, had the Court found that the regulations constituted a "taking," under the rule proposed by the Appellant the United States Government would have unintentionally and involuntarily purchased all Indian artifacts containing lawfully obtained bird feathers, a result which surely was the furthest thing from Congress' intention when it passed what it thought was a regulatory scheme.

As the Court is well aware, cities and towns throughout the country are hard pressed to raise enough revenue to keep their basic functions intact. *See, e.g.,* First National Bank of Boston, Economics Department, *Urban Financial Stress: A Comparative Analysis of Sixty-Six U.S. Cities*

(1979); U.S. Congress, Joint Economic Committee, *The Current Fiscal Condition of Cities: A Survey of 67 of the 75 Largest Cities* (1977). To be sure, such financial concerns do not authorize cities and towns to short-cut constitutional limits on the use of regulatory power, but they certainly do make it clear that this is not the time for the Court to impose potentially tremendous financial liability on units of local government for past and future regulatory mechanisms where the governmental agencies involved had no intention, and no idea, of spending their funds for what they thought were regulatory plans.

2. *A damage remedy will preclude effective government generally and land use regulation in particular.* This Court has recognized that the line between a permissible land use regulation and an unconstitutional overregulation will frequently depend on the facts of a given situation. *See Penn Central Transportation Co.* v. *New York City, supra*, 438 U.S. at 124. Indeed, even Appellant's most ardent supporters admit that whether a regulation is overly burdensome is often a highly factual inquiry and "there are simply no readily ascertainable and pragmatically applicable legal criteria" (NAM Br. at 7) to determine in advance if a regulation is or is not permissible. As this Court observed long ago in *Village of Euclid* v. *Ambler Realty Co., supra*:

> "'[P]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." 272 U.S. at 386-87.

Under these circumstances, it is hardly reasonable to require state and local legislatures to guess in advance as to all the possible factual permutations of a particular

regulation and to expose themselves to liability for huge damage awards if in retrospect they are judged to have guessed wrong. The combined effect of the absence of clear legal criteria and the prospect of substantial financial liability would impose such a great risk on local land use regulation as to bring regulatory activities to a virtual standstill.

Thus, as noted in Mr. Justice Rehnquist's concurring and dissenting opinion in *Butz* v. *Economou, supra*:

> "It simply defies logic and common experience to suggest that officials will not have this [*i.e.*, the availability of damages] in the back of their minds when considering what official course to pursue. It likewise strains credulity to suggest that this threat will only inhibit officials from taking action which they should not take in any event. It is the cases in which the grounds for action are doubtful, or in which the actor is timid, which will be affected. . . ." 438 U.S. at 526-27.

In the context of land use regulations, the California Supreme Court pointed out several years ago that

> "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation . . . the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." *Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 120, 109 Cal. Rptr. 799, 805, 514 P.2d 111, 117 (1973).[10]

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[10] The results of a recent survey of its members by Amicus National Association of County Planning Directors confirm this analysis. When presented with a hypothetical factual situation closely paralleling that held to be permissible regulation by this Court in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962) (closing of quarry through police power regulation), 48 percent of the nearly 300 respondents indicated that they would attempt to close the quarry and risk invalidation of their action, while only 8 percent said they would do so if confronted with the possibility of a damage award for excessive police power regulation. *See* National Association of County Planning Directors, *Zoning Survey Results* (September 1980).

Moreover, thoughtful commentators have uniformly reached the same conclusion. For example:

> "Availability of a remedy under inverse condemnation would inhibit the exercise of the police power. The possibility of incurring significant, unanticipated liability in money damages as a result of invalidation of a zoning ordinance in an inverse condemnation action would have a chilling effect on governmental experimentation in land-use controls. This inhibition would most severely affect rapidly growing communities—those that most need innovative land-use control, yet are least able to risk incurring such liability." Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance,* 26 Stan. L. Rev. 1439, 1450 (1974).

See also to the same effect 5 Williams, *American Land Planning Law* § 159.18 (1975) and § 158.09 (1979 Supp.);[11] L. Bozung, *Judicially Created Zoning With Compensation: California's Brief Experiment with Inverse Condemnation,* 10 Environmental Law 67 (1979); Note, *Eldridge* v. *City of Palo Alto: Aberration or New Direction in Land Use Law?,* 28 Hastings L.J. 1569 (1977).

However, Appellant and its supporters, citing this Court's recent decision in *Owen* v. *City of Independence,* 100 S. Ct.

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[11] Professor Williams states that while there may occasionally be extraordinary circumstances under which an "inverse condemnation" damage remedy would be appropriate, "real dangers would be involved in a proposal [such as that made by Appellant here] to expand inverse condemnation to play a major role in the whole system." Indeed, Professor Williams noted that allowing "inverse condemnation" would make regulation "financially impossible for a municipality" and would, as a result, "break the whole scheme of land use controls." 5 Williams, *American Land Planning Law* § 159.18 (1975). For that reason, Professor Williams specifically approved the reasoning of the California Supreme Court in *Agins* v. *City of Tiburon, supra,* "The court was clearly correct in its conclusion that any other conclusion would have severely inhibited needed public regulation." 5 Williams, *American Land Planning Law* § 158.09, at 44 (1979 Supp.).

1398 (1980), insist that the appropriate response to the fear of excessive acquisition of property and its concomitant cost to state and local governments is for government agencies to exercise care in the regulation of private property. (*E.g.*, Pacific Legal Foundation Br. at 22-27; NAM Br. at 16-17). They argue that in *Owen*, a Section 1983 action, this Court held that a municipality has no good faith immunity from liability for firing its police chief without a hearing, even if the municipality could not have forseen that its actions would be unconstitutional, and that the same principles should apply here.

But there are a number of compelling differences between *Owen* and the present case.

First, the actions of which Appellant complains in the present case are legislative—the enactment of rezoning and adoption of an open space plan by the San Diego City Council. This Court has always upheld immunity for legislative activities, recognizing that the legislative branch, at least, cannot function under threats of damage suits. *E.g.*, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency, supra,* 440 U.S. at 402-05; *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951); *see also Gorman Towers, Inc.* v. *Bogoslavsky,* —— F.2d —— (8th Cir. 1980) (municipality absolutely immune from liability under Section 1983 for legislative act of downzoning property).

Second, the rule Appellant seeks is in no way limited to municipalities, which the Court in *Owen* found traditionally had been treated differently from other governmental units for Section 1983 purposes. 100 S. Ct. at 1410-11. Instead, the damage rule sought by Appellant would apply equally to the State of California if, for example, its Coastal Zone Management Act as applied in some unforeseen circumstances were found to constitute a "taking," or to the federal government.

Third, there is a significant difference between the nature of the actions challenged in *Owen* and here. *Owen* involved

a single person, who had been fired without a hearing. The extent of the potential liability was not large, the rule of law involved was relatively clear (*i.e.*, if there is any doubt, have a hearing), and future compliance would neither be particularly costly nor require the municipality to forego important governmental functions.

As previously discussed, with land use regulations, on the other hand, there is no easy rule of law to follow. It is, therefore, completely counterproductive to discourage much needed innovative planning by imposing damage remedies, potentially on a widescale basis, for good faith regulation. Moreover, damages are particularly inappropriate with land use regulations where on the one hand an owner like Appellant insists that a regulation goes too far when development is not allowed in a floodplain, but other owners file lawsuits for damages if they are flooded when floodplain development is permitted. *See, e.g., Blau* v. *City of Los Angeles*, 32 Cal. App. 3d 77, 107 Cal. Rptr. 727 (1973).[12]

3. *A damage remedy will not promote other useful goals.* Appellant's supporters make a variety of claims to the effect that giving Appellant damages in this case will cure the nation's housing ills. The supposed salutary results range from discouraging racial discrimination (Pacific Legal Foundation Br. at 9-12) to encouraging cheap housing (NAHB Br. at 8-11) to avoiding insect damage to forests (NFPA Br. at 9-10). Of course, the present case has nothing to do with any of these issues. There is no question here as to racial discrimination, forest harvesting, or any housing, cheap or otherwise.

Instead, the main premise of Appellant and its supporters seems to be that there are too many limitations on land

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[12] Interestingly, the plaintiff's counsel in *Blau*, who argued that damages should be awarded for the City of Los Angeles' failure to preclude development in a floodplain, is the same as now argued on behalf of the NAM that the City of San Diego should pay damages for allegedly refusing to allow such development.

use in California and that these regulations have helped drive up the cost of land development, so that anything which would discourage regulation is useful. But, as Appellant's supporters admit elsewhere, all the California land use regulations of which they complain have been sustained as lawful. (*E.g.*, NAM Br. at 20-22). Thus, even assuming their premise is correct, the argument of Appellant's supporters is really that this Court should discourage California and other states from legitimate land use regulation by providing severe penalties for any misstep. However, the extent of regulation and the relative value accorded such factors as savings in housing costs, if any, as opposed to the deterioration in living conditions caused by unregulated urban sprawl, is properly a matter for consideration by the various state and local legislative bodies. Appellant's arguments on this subject should be made there, not here. *Compare National League of Cities* v. *Usery, supra; Pamel Corp.* v. *Puerto Rico Highway Authority, supra,* 621 F.2d at 36.

* * *

Amici submit that the creation of a damage remedy in the circumstances of the present case would be unprecedented, unwarranted, unwise, and contrary to longstanding policy governing the relationship between the judicial and legislative branches and between federal, state and local government. Until now this Court has uniformly left it to the legislative branch to determine, in the event that a regulatory scheme went "too far," whether to proceed and pay compensation or to abandon or change the regulation. In those cases where the legislature has made it clear that it intended to proceed and pay compensation, then compensation has been awarded. When, on the other hand, no compensation was intended, injunctive relief has been granted. That is the rule the California courts have properly followed below.

CONCLUSION

If this Court holds that there has been a "taking" and reaches the remedy issue, Amici believe for the foregoing reasons that the holding of the California Court of Appeal on the remedy issue should be affirmed.

Respectfully submitted,

PETER VAN N. LOCKWOOD
CAPLIN & DRYSDALE
1101 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorney for Amici Curiae

Of Counsel:

STEPHEN N. DENNIS
EDWARD P. THOMPSON, JR.
Washington, D.C.

October 1980

APPENDIX

APPENDIX A

The interests of Amici are as follows:

1. The National Trust for Historic Preservation is the leading national organization in the field of historic preservation. It was chartered by Congress in 1949 as a "charitable, educational, and nonprofit" corporation "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest," and to preserve and administer historical properties significant in American history and culture for the public benefit. 16 U.S.C. § 468. The National Trust has more than 160,000 contributing members, including approximately 2,000 member organizations involved in local and regional historic preservation activities.

2. The National Association of Counties ("NACo") is a private, nonprofit organization that represents the interests of its approximately 1,900 member counties throughout the United States. County governments have a vital interest in regulating land use and thereby promoting orderly growth, protecting their local environments, controlling the costs of providing community services, and creating a diversity of housing opportunities. NACo believes that an adverse ruling in the instant case would severely interfere with legitimate land use regulation by county government.

3. The National Association of County Planning Directors ("NACPD") is a private, nonprofit organization, affiliated with the National Association of Counties. NACPD represents the interests of its approximately 1,000 members, who are the chief land use planning officers of their respective counties. NACPD has a vital interest in land use regulation as an important vehicle by which to protect the health, safety and welfare of local communities.

4. The National Wildlife Federation is a nationwide conservation organization dedicated to the restoration, wise

use and perpetuation of natural resources. Headquartered in Washington, D.C., the Federation has over 2,500,000 members and affiliate organizations in all 50 states, as well as Guam, Puerto Rico and the Virgin Islands. The Federation's membership in California is over 121,000, including the members of its affiliate, the California Natural Resources Federation. The Federation and its members and member groups, including the California Natural Resources Federation, have a long standing interest in ensuring that zoning regulation provides for critical area protection, rational land use planning and landmarks preservation.

5. Preservation Action is a nonprofit organization located in Washington, D.C. which actively participates in the legislative process. Preservation Action encourages the protection of historic buildings and districts, the protection of neighborhoods and the promotion of neighborhood conservation.

6. The National Parks and Conservation Association is a membership organization with approximately 35,000 members and contributors nationwide. The Association's main goal is the preservation and expansion of the National Park system. It is particularly concerned with the units of this system, but the Association has found that approximately two-thirds of the National Park system's units are adversely affected by incompatible land uses and activities outside their borders. The Association has concluded that in the long run one of the most promising solutions to these problems is the application of local land use laws, especially zoning, to prevent adverse uses and activities.

No. 79-678

Supreme Court, U.S.
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v.

CITY OF SAN DIEGO, *et al.*,

Appellees.

On Appeal from the Supreme Court of California

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for the State of New Jersey,
State House Annex,
Trenton, New Jersey 08625.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

DEBORAH T. PORITZ,
RICHARD M. HLUCHAN,
Deputy Attorneys General,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

Interest of the *Amicus*

The State of New Jersey has filed a separate *amicus curiae brief* in this matter because resolution of the issues raised here will undoubtedly affect important and wide ranging legislative programs carefully fashioned to preserve the environment and the resources of this State.

Appellant challenges a decision of the California Court of Appeal which had been directed by the Supreme Court of California to reconsider its earlier disposition in light of *Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979). Thus, that part of the *Agins* holding which the Court did not reach last term is again presented for review. As in *Agins,* the California court has held that a landowner who claims that he has been deprived of substantially all use of his property because of restrictive land use legislation may not seek damages in inverse condemnation but, rather, must seek invalidation of such legislation by way of an action for declaratory relief or administrative mandamus.

If this decision is reversed by the Court, New Jersey's ability to develop innovative and flexible land use programs which address major environmental concerns will be seriously hampered. It is unfortunately true that entire water supply systems have been declared unsafe in New Jersey. Hazardous chemicals have been dumped indiscriminately over the land. In large part, such pollution has been brought about by haphazard growth and development. We know now that our resources are finite and that we must preserve whatever is not yet irretrievably lost. Land use controls are an important means by which the State's resources can be protected. If the California decision is reversed, however, responsible public officials will fear the financial consequences should good faith attempts to limit land use be held to "take" private property.

The New Jersey Legislature has enacted a series of comprehensive land use statutes which promote orderly and appropriate development while insuing that the State's resources are not squandered. These regulatory programs form the basis for a State effort to halt the deterioration

of the environment and, at the same time, create a framework for rational, planned growth.

The first such environmental land use legislation, N.J.S.A. 58:1-26 *et seq.,* was passed in response to recurring flood hazards exacerbated by intensive development along stream corridors throughout the State. Its purpose was "to safeguard the public against danger from the waters impounded or affected by . . . structure[s]" within the channel of any stream. N.J.S.A. 58:1-26. This statute provided some measure of flood protection by controlling development which altered the capacity of streams to carry and retain storm water.

More recently, L. 1979, ch. 359 (originally enacted as L. 1962, ch. 19 and codified at N.J.S.A. 58:16A-50 *et seq.*), established a delineation and regulatory program for flood prone areas so as to permit the State to more effectively deal with the flooding problems encountered in New Jersey river basins. Pursuant to this legislative mandate the State Department of Environmental Protection (hereinafter "DEP") has promulgated regulations which establish prohibited uses and exceptions thereto, non-regulated uses and regulated uses. See N.J.A.C. 7:13-1.4, 1.5, 1.6. Structural development and alteration of ground contours and water channels are generally prohibited in the floodway, as are the storage and processing of pesticides, various types of waste and hazardous materials; low hazard uses such as agriculture and recreation are permitted or not regulated. The Supeiror Court of New Jersey has held that this regulatory scheme, as applied to land located within the floodway, has not resulted in a taking without compensation contrary to the "taking" clause of the Fifth Amendment to the United States Constitution. *Usdin and Hirsch* v. *State,* 173 N.J. Super. 311, 414 A.2d 280 (Law

Div. 1980); *Schroth* v. *DEP,* No. A-229-78 (App. Div. N.J. Mar. 25, 1980), certif. denied, —— N.J. —— (May 30, 1980).

The delineation of flood hazard areas reflects a new understanding of their importance as natural flood retention basins. The importance of the State's coastal wetlands was also recognized by the New Jersey Legislature in 1970 by the passage of the Wetlands Act, N.J.S.A. 13:9A-1 *et seq.* This Act directs the Commissioner of the DEP to inventory and map the State's wetlands and authorizes him to adopt "orders regulating, restricting or prohibiting dredging, filling, removing, or otherwise altering, or polluting coastal wetlands." N.J.S.A. 13:9A-2. Under N.J.S.A. 13:9A-4 no person may conduct a "regulated activity" on mapped wetlands without a permit; however, N.J.S.A. 13:9A-6 specifically provides that any person whose lands are affected by an order or permit may file a complaint in the Superior Court of New Jersey "to determine whether such order or permit so restricts or otherwise affects the use of his property as to deprive him of the practical use thereof." In such a case, if the court finds that there has been an unreasonable exercise of the police power the Legislature has expressly approved but one remedy—the invalidation of the order or permit as applied to the complainant's property.

In the seventeen years prior to the passage of the Wetlands Act, an average of 1,900 acres of New Jersey coastal wetlands were lost to development each year. Since the Act the DEP has permitted the development of only 375 acres through the issuance of 116 permits (as of August 31, 1977). In two cases where permits have been denied the New Jersey courts have determined that the individual plaintiffs were not thereby deprived of the practical use of their lands. *American Dredging Co.* v. *State,*

169 N.J. Super. 18, 404 A.2d 42 (App.Div. 1979), and *Carton* v. *State of New Jersey,* No. A-638-73 (App. Div. N.J. Jan. 27, 1978).

The wetlands actually encompass a small part of the New Jersey coastal area regulated by the DEP. The Coastal Area Facility Review Act of 1973, N.J.S.A. 13:19-1 *et seq.* (hereinafter "CAFRA"), is the State's major coastal legislation. This statute is a comprehensive legal mandate for the DEP to control and plan the development of a "unique, irreplaceable and delicately balanced" area of New Jersey known as the coastal zone. See N.J.S.A. 13:19-2; N.J.S.A. 13:19-16. The DEP was given the task of weighing the need to preserve New Jersey's coastal environment against competing economic pressures through permit decisions which balance these interests according to the statutory dictates.

The CAFRA statute requires that an applicant submit a rigorous environmental analysis of a proposed project and its impact upon the site and the surrounding region. N.J.S.A. 13:19-7. Only if it is found that the project will cause minimal impairment may a CAFRA permit issue and, even then, the DEP is given wide latitude to impose conditions upon the project if its construction would "tend to violate the purpose and intent of the act" or if it would "materially contribute to an already serious and unacceptable level of environmental degradation or resource exhaustion." N.J.S.A. 13:19-11.

Where an applicant has been denied a permit to construct a facility within the coastal area, he may challenge that denial through an administrative appeal process. In one such case, an applicant has sought approval for a housing development to be constructed, in part, along the natural water's edge where the seasonal high water table is at the surface; in another, a natural area suitable

for agricultural uses because of its highly fertile soils has been proposed as a site for similar residential development. Both applicants have alleged that the DEP's refusal to allow the proposed development constitutes a "taking" without just compensation.

Two other major regional planning efforts based primarily on a careful balance between environmental values and economic pressures have been authorized by the New Jersey Legislature. In 1969, by enacting the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:7-1 *et seq.*, the Legislature created the Hackensack Meadowlands Development Commission (hereinafter HMDC) to oversee the orderly reclamation and development of approximately 21,000 acres of salt water meadows in the lower Hackensack River basin. This land is low and flat and the geology and soils make drainage and construction difficult. Many areas in the district have been used as a dumping ground for municipal wastes and the Hackensack River has been contaminated by the discharge of large quantities of sewage and other impurities. A governmental body with regional land use powers and technical expertise to coordinate development while protecting the meadowlands environment was urgently needed. See N.J.S.A. 13:17-1.

The HMDC was charged with the task of formulating a Master Plan to guide development in the District. During the period when the Plan was being prepared, interim zoning measures were adopted whereby further development was permitted only on the fringes of the District for a 26 month period. This zoning was unsuccessfully challenged as a taking in *Meadowlands Regional Development Agency* v. *Hackensack Meadowlands Development Commission,* 119 N.J. Super. 572, 293 A.2d 192 (App. Div. 1972). In 1972, the HMDC adopted its final Master Plan,

including codes and standards covering land use, comprehensive zoning, subdivisions, building construction and solid waste disposal. Large areas in the Meadowlands, generally undeveloped, were zoned for open space and recreational uses; much of this land is valuable marshland and/or adjacent to the waterways which criss cross the District. Since these zoning restrictions may well reduce the profit that can be derived from the land, they are likely to be attacked as confiscatory.

Most recently, the State of New Jersey has embarked on a bold and important new venture in regional land use planning. The Pinelands Protection Act, N.J.S.A. 13:18A-1 *et seq.*, directs a massive planning effort which may well become a model for other ecologically sensitive areas of the nation subject to intense development pressures. The Pinelands of New Jersey contain about one million acres of pristine pine oak forest, cedar bogs and wetlands and extensive ground and surface water resources of high quality which provide a unique habitat for a wide diversity of rare, threatened and endangered plant and animal species. See *N.J. Builders Association* v. *DEP,* 169 N.J. Super. 76, 404 A.2d 320 (App. Div.), certif. denied, 81 N.J. 402, 408 A.2d 796 (1979). The area covers 20% of New Jersey's total land mass and is the largest contiguous semi-wilderness in the urban corridor extending from Boston to Washington, D.C.

In late 1978, Congress recognized that "there is a national interest in protecting and preserving" the unique ecology of the Pinelands for "the residents of and visitors to the areas." The area was designated as the "Pinelands National Reserve," and an appropriation of $26 million in federal funds was authorized to purchase land of critical ecological value and to devise a comprehensive plan for the management of the Reserve. 16 U.S.C. §471i.

Echoing the concerns of Congress, and decrying the "current pace of random and uncoordinated development and construction" which poses "an immediate threat to the resources" of the Pinelands, the New Jersey Legislature enacted the Pinelands Protection Act as a complement to the federal legislation. N.J.S.A. 13:18A-2. The Act creates a 15 member Pinelands Commission which is mandated to prepare, adopt and implement a comprehensive management plan for the entire area. N.J.S.A. 13:18A-8. Pending adoption of the plan, stringent limits were placed upon any construction or development within the Pinelands. N.J.S.A. 13:18A-14.

Both the federal legisation and the State Act require the Pinelands comprehensive management plan to consider and detail a wide variety of land and water protection and management techniques, including zoning and regulation derived from State and local police powers, development and use standards, permit systems, and acquisition of conservation easements and other interests in land. 16 U.S.C. §471i(f)(3)(A); N.J.S.A. 13:18A-8(d)(1). Both Congress and the State legislature have specifically directed that the management plan "include a policy for the use of State and local police power responsibilities to the *greatest extent practicable* to regulate the use of land and water resources . . ." (16 U.S.C. §471i(f)(3)(B); N.J.S.A. 13:18A-8(d)(2) (emphasis added). By providing for protection of areas of critical ecological importance through purchase, and protection of the rest of the vast Pinelands through regulation, both legislatures have sought to safeguard the entire area in the public interest.

The Pinelands Commission adopted a plan for the central core of the Pinelands on August 8, 1980, and is expected to complete work on the remainder of the plan by December 15, 1980. Under the State Act, the adopted com-

prehensive management plan supersedes all other zoning laws for the area and no construction or development is permitted unless it conforms to the plan. N.J.S.A. 13:18A-10(c). The plan has already been challenged in State court on the basis that it "takes" land without just compensation. *City of Brigantine, et al.* v. *Pinelands Commission,* No. A-312-80 (App. Div. N.J. filed September 22, 1980). Moreover, the stringent interim limitations now in effect in the Pinelands have generated hundreds of requests for administrative review. A number of applicants have raised the "taking" issue against the Commission in federal court. *Hovson's, Inc.* v. *U.S.,* No. 80-1469 (D. N.J. filed May 21, 1980); *Hardt* v. *U.S.,* No. 80-2325 (D. N.J. filed July 24, 1980).

This series of comprehensive statutes enacted by the New Jersey Legislature represents innovative approaches to regional land use control. Such statutes are required if important environmental concerns are to be properly addressed. Historically, development in New Jersey and other areas of this country has largely proceeded on a piecemeal basis through local zoning centered on local, parochial needs. A major result has been the destruction of natural resources that, in many instances, is irreversible. Only in this last decade has there been a State and regional effort to halt irresponsible development and preserve the environment.

The California courts have recognized that the appropriate remedy where land use controls are found to violate the property rights of landowners is invalidation of those controls. This approach is necessary in order to prevent the undermining of future land use planning. A reversal by the Court could impose serious financial burdens on small municipalities and even greater impacts at the State and regional levels. Government officials charged

with planning and regulatory responsibilities for environmentally important areas would fear potential liability in those many situations where the public interest collides with development pressures. Government agencies could suffer severe financial hardship even though officials acted in good faith and in accordance with the best available technical and legal advice. The State's land use planning efforts would be rendered nugatory in such circumstances.

Clearly the State of New Jersey has a vital interest in compelling a private property owner to seek invalidation of zoning restrictions rather than a remedy in inverse condemnation.

ARGUMENT

Invalidation of regulatory restraints which deprive a landowner of substantially all use of his property affords complete and adequate relief consonant with the Fifth and Fourteenth Amendments to the United States Constitution.

It has long been a principle of law established by the Court that government may, pursuant to its police power, impose limitations on the use of real property in order to protect the public health, safety and welfare. *Miller* v. *Schoene,* 276 U.S. 272 (1928); *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Mugler* v. *Kansas,* 123 U. S. 623 (1877). Under traditional due process analysis, an exercise of the regulatory authority of the State must bear a substantial relation to a legitimate governmental purpose. Morever, the means chosen must be reasonably necessary to achieve the ends sought and not unduly oppressive upon private individuals. *Penn Central Trapsp. Co.* v. *New York City,*

438 U.S. 104 (1978); *Goldblatt* v. *Hempstead,* 369 U.S. 590 (1962). In the land use context, regulation may become unduly oppressive and therefore unreasonable when limitations on use become so restrictive as to deprive a landowner of substantially all use of his property. *Nectow* v. *Cambridge,* 277 U.S. 183 (1928). As stated by Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon* fifty eight years ago:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.

This rule blends the due process unreasonableness test with the "taking" limitation of the Fifth Amendment to the United States Constitution. The result is a balancing of public benefits and private losses. Indeed, Justice Holmes framed the issue in terms of a continuum in which the permissible exercise of the police power gradually merges into forbidden restraints on private property:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment

> of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power." *Id.* at 413.

Pennsylvania Coal Co. v. *Mahon* clearly mandates a case by case analysis in which the public purpose of the challenged legislation is weighed against the extent of deprivation imposed on private property. *See, Penn Central Transp. Co.* v. *New York City,* 438 U.S. at 123-128; *see generally* W. Stoebuck, *Nontrespassory Takings in Eminent Domain* (1977); F. Bosselman, D. Callies & J. Banta, *The Taking Issue* (1973); *Development in the Law —Zoning,* 91 Harv. L. Rev. 1027, 1481-1482 (1978).

The case at bar involves local zoning which limits the use of appellant's property to light industry and agriculture with an open space general plan designation. Appellant claims that the zoning regulations combined with the open space element of the city's general plan render its property useless, and it therefore seeks damages in inverse condemnation. The California Court of Appeal decided that "[u]nlike the person whose property is taken in eminent domain, the individual who is deprived of his property due to the State's exercise of its police power is not entitled to compensation." (J. S. App. G., p. 3-4). Relying upon the ruling in *Agins* v. *City of Tiburon,* 23 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), the court held that a landowner's remedy for government's "alleged overzealous use of the police power" is injunctive or declaratory relief, not damages by way of inverse condemnation. (J. S. App. G., p. 4).

In *Agins,* the California Supreme Court determined that a landowner who alleges that zoning regulations deprive him of substantially all use of his land is limited to seeking invalidation of the restrictive legsilation under

the Fifth Amendment to the United States Constitution. In reaching this conclusion, the court reaffirmed the balancing test enunciated by Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon.* It suggested, however, that the Holmes' rule —"if regulation goes too far it will be recognized as a taking"—had "generated some confusion" in regard to whether damages were available as a remedy in zoning cases. It pointed out that the Supreme Court did not grant damages in that case but rather had "declared void the exercise of police power which had limited the company's right to mine its land." 23 Cal. 3d at 274, 598 P.2d at 29, 157 Cal. Rptr. 376.

In fact, the Court has awarded damages in inverse condemnation only in those cases involving non-regulatory governmental action or where there has been a physical invasion of property by government. *See, e.g., United States* v. *Causby,* 328 U.S. 256 (1946); *See also,* Note, *Inverse Condemnation: Its Availability in Challenging the Validity of Zoning Ordinances,* 26 Stan. L. Rev. 1439, 1442, 1443 n. 16 (1974). This is consistent with traditional understanding of the inverse condemnation cause of action. As explained in *United States* v. *Clark,* 100 S. Ct. 1127, 1130 (1980), there must be an intention by government to occupy the land, coupled with actual physical occupation, in order to trigger a remedy in inverse condemnation. *See, e.g., Dugan* v. *Rank,* 372 U.S. 609 (1963); *Hurley* v. *Kincaid,* 285 U.S. 95 (1932). As recently noted by the First Circuit, in no case has a federal court "ordered a state or local government unit to pay for a diminution of the value of a piece of property caused by a zoning regulation." *Pamel Corp.* v. *Puerto Rico Highway Authority,* 621 F. 2d 33, 35 (1st Cir. 1980).

The teaching of these cases is that where an actual physical invasion, or action tantamount to such inva-

sion, is involved, then the Fifth Amendment mandates an award of "just compensation." But, where substantially all use has been denied as a result of overly restrictive regulation, invalidation of the restrictive statute restores the land to the owner. While physical takings are largely irreversible, removal of regulatory restraints which offend the Constitution permits a litigant to utilize his property as before. Due process does not and should not require more.

Moreover, policy considerations strongly militate against a damages remedy in cases involving unconstitutional restrictions on property. Early in this century, Justice Sutherland recognized that proliferating development would require new controls by government:

> "'The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly.'" *Euclid* v. *Ambler Realty Co.*, 272 U.S. at 392 (citation omitted).

Such limitations are even more necessary today. We have either squandered our natural resources or rendered them unusable for many generations. The results of our indiscriminate use of the land have been forcefully brought to public attention by the closure of contaminated public water supply systems and the shortage of vitally needed resources. We must plan for the future through broad state and regional land use programs designed to halt deterioration of the environment and reclaim our dwindling resources.

As already noted New Jersey has, particularly in the last decade, moved vigorously to control development and

preserve the land. It has done so through the enactment of comprehensive legislation regulating flood prone areas, wetlands, the coastal zone, and other unique, ecologically sensitive regions such as the Hackensack Meadowlands and the Pinelands. In each case the New Jersey Legislature has provided an administrative mechanism for review and adjustment in order that an overall comprehensive plan can be individually tailored to fit the physical realities of particular parcels of land. Such a process affords a property owner the opportunity to demonstrate that the uses permitted under substantive regulations are incompatible with any beneficial use of his land.

In those instances resulting in a determination of incompatability the goals and objectives of the plan can be reassessed. The appropriate officials may then choose either to adjust the plan or to acquire the property in question. In the event that an agency in good faith erroneously applies overly restrictive regulations to a particular property, judicial invalidation of such regulations will trigger the same type of administrative reassessment. In this manner, the landowner is protected and government planning objectives can be met.

The adverse impacts of a remedy in inverse condemnation are not counterbalanced by any commensurate benefits to individual litigants. Invalidation of restrictive legislation is an appropriate and adequate remedy for landowners temporarily denied the beneficial use of their lands.

CONCLUSION

It is respectfully submitted that a landowner aggrieved by legislation which substantially limits the use of his property may seek to establish the invalidity of such legislation but may not recover damages in inverse condemnation. Therefore, the decision of the California Court of Appeal should be affirmed.

Respectfully submitted,

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for the State of New Jersey

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

DEBORAH T. PORITZ,
RICHARD M. HLUCHAN,
Deputy Attorneys General,
On the Brief.

No. 79-678

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation,
Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation; PETE WILSON, Mayor, F. GILBERT JOHNSON, MAUREEN O'CONNOR, LEE HUBBARD, LEON L. WILLIAMS, FLOYD L. MORROW, JIM BATES, ROBERT MARTINET, and JAMES ELLIS, Members of the City Council of San Diego; JAMES L. GOFF, Planning Director of the City of San Diego; and DOES I through XXV, inclusive,
Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE SAN DIEGO URBAN LEAGUE, INC., IN SUPPORT OF APPELLANT

RONALD A. ZUMBRUN
THOMAS E. HOOKANO
COUNSEL OF RECORD
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae San Diego Urban League, Inc.

ELLEENE A. KIRKLAND
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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No. 79-678

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SAN DIEGO GAS & ELECTRIC COMPANY, a corporation,
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CITY OF SAN DIEGO, a municipal corporation; PETE WILSON, Mayor, F. GILBERT JOHNSON, MAUREEN O'CONNOR, LEE HUBBARD, LEON L. WILLIAMS, FLOYD L. MORROW, JIM BATES, ROBERT MARTINET, and JAMES ELLIS, Members of the City Council of San Diego; JAMES L. GOFF, Planning Director of the City of San Diego; and DOES I through XXV, inclusive,
Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE SAN DIEGO URBAN LEAGUE, INC., IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, the San Diego Urban League, Inc. (Urban League), respectfully submits this brief amicus curiae in support of appellant San Diego Gas & Electric Co. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

The Urban League is a nonprofit community service organization serving the County of San Diego. It is affiliated with the national headquarters in New York City and affiliates in cities throughout the nation. As a community service organization, the Urban League uses the tools and methods of social work, economics, law, and other disciplines to secure equal opportunities in all sectors of our society for Black Americans and other minorities.

The comprehensive goal of the Urban League is to eliminate discrimination and segregation in San Diego County, to increase the economic and political empowerment of blacks and other minorities and, in short, to assist minorities to share equally in the responsibilities and rewards of full citizenship. To accomplish this goal, the Urban League intervenes at all points in the social, ecomonic, and judicial structure where the interests of blacks, other minorities, and the poor are at stake.

Of particular concern to the Urban League is the development of housing opportunities for low and moderate income families. With this concern in mind, the San Diego Urban League has endeavored to advance the efforts of various individuals, organizations, and institutions within the City and County of San Diego to:

1. increase the existing housing stock sufficiently to accommodate the rapidly accelerating demand for housing serving all income groups, and

2. accelerate plans and efforts to facilitate industrial and commercial development in order that job opportunities be reasonably equivalent to the demand.

In a more direct fashion, the San Diego Urban League has implemented its commitment to the development of housing opportunities for all income groups by constructing 57 single-family rental homes. A final subdivision map has

been obtained for 33 additional market rate units. Moreover, the Urban League is currently in the process of developing plans for the construction of 200 condominiums. A significant portion of the San Diego Urban League's development activities has been located in minority neighborhoods. This activity is geared toward furthering the Urban League's goal of providing "real" ownership opportunities in the community as opposed to merely "psychological" opportunities. From a pragmatic standpoint, the Urban League realizes that government cannot be the sole provider of needed housing, nor should it be. For this reason, the San Diego Urban League has taken those affirmative steps necessary to the creation of equal housing opportunities.

The opinion of the California Court of Appeal below, *San Diego Gas & Electric Co. v. City of San Diego* (Jurisdictional Statement, Appendix G), rests upon the opinion of the California Supreme Court in *Agins v. City of Tiburon,* 24 Cal. 3d 266 (1979), and holds:

> "A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus (*Agins v. City of Tiburon, supra,* 23 Cal. 3d 605, 611)." *San Diego Gas & Electric Co. v. City of San Diego,* Jurisdictional Statement, Appendix G at 4.

In holding that a property owner faced with unconstitutional land use regulation may never seek compensation in inverse condemnation, the California courts have eliminated a remedy essential to guarantee responsible police power regulation and regulation which is free from arbitrary and unconstitutional effects. Moreover, elimination of the remedy eradicates one more tool necessary to the realization of both improved housing conditions and opportunities. The interests thus presented to the Court by this

case transcend those of the utility company, they include the interests of a broad spectrum of our society.

The Urban League is particularly mindful of the fact that unnecessarily restrictive land use regulations operate to limit the housing opportunities of its members. These limitations are a product of both a decline in the actual number of housing units constructed and the unconscionably high prices of the artificially constrained number of units which are made available. The shortages occasioned by such restrictive regulations translate not only into a decline in the quality and quantity of the regional housing stock, but also into a loss of mobility among current and prospective residents. Studies have documented the filtration phenomenon as being a product of new housing construction.[1] Filtration is the process by which new housing opportunities are created by making available those units which have been vacated by new home purchasers.[2]

As representatives of those who would be among the primary beneficiaries of this filtration process, the Urban League is vitally interested in its proper functioning and therefore seeks to ensure that construction occurs at a level sufficient to permit the continuing functioning of the process.

Additionally, basic economic principles affect the delivery of housing. Access to housing is more readily available and more easily achieved where market disequilibrium is minimized. Overly restrictive land use regulations operate to disturb this necessary equilibrium by creating

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[1]Lansing, Clifton, and Morgan, "New Homes and Poor People, A Study of Chains of Moves," Institute for Social Research, University of Michigan (1969).

[2]*See* Housing Urban America (Pynoos, Schafer and Harftman eds. 1973) at 204-05, and Lansing, Clifton, and Morgan, *supra* note 1.

more risks attendant to entry into the housing market. The investment risk is clear—the costs of uncertainty, of delay, and of the potential for ultimately being unable to make any reasonable economic use of one's property. Amicus believes that the decision appealed from herein will create further market disequilibrium, deter the production of housing, and deny access to housing to greater segments of the population.

It is the Urban League's position that community interests are best served by making adequate provision for the housing needs of all income groups. Amicus curiae strongly believes that the effect of the decision rendered by the Court of Appeal in the instant case will be contrary to these interests.

The Urban League views property rights as basic civil rights. It believes that only through the provision of a full range of effective remedies can property rights be protected and the negative impacts of arbitrary and discriminatory land use regulation be avoided. The Urban League is not opposed to responsible land use planning; it recognizes that planning can be used to further a variety of legitimate goals. This recognition, however, does not diminish the fact that land use regulatory policies have also been used for illegitimate purposes, including the exclusion of minorities and individuals of disadvantaged economic status. The Urban League suggests that it is only through the provision of both the money damages remedy and the invalidation remedy that its goal of eliminating discriminatory land use policies and facilitating upward mobility for its members can be realized. In order to fully represent the views of its members, it addresses the issues raised herein from both the perspective of property owners who are faced with regulatory excesses and persons in search of affordable housing who would be the beneficiaries of responsible land use regulation.

SUMMARY OF ARGUMENT

1. The *San Diego Gas & Electric Co.* decision, in reliance upon *Agins v. City of Tiburon, supra,* limits the remedies available to a property owner subjected to unconstitutional regulation. The limitations result in invalidation being the sole remedy available. Amicus takes the position that a full range of remedies is essential to the preservation of basic constitutional rights and protection from arbitrary, discriminatory, and exclusionary land use policies. The judicially prescribed remedy fails to provide a full measure of relief to the property owner injured by unconstitutional regulation in that it operates to perpetuate the injury. Similarly, the invalidation remedy fails to protect the individual confronted with exclusionary land use practices in that it fails to operate as an effective deterrent to discriminatory action. In both cases, by limiting the remedies available, the injured parties are left with a nonremedy. The Urban League believes that it is only through the provision of a full range of remedies that adequate relief can be afforded.

Amicus further argues that restriction of judicial remedies operates to the detriment of the housing consumer. The effect of absolving communities from the consequences of their decision making is to encourage arbitrary and exclusionary land use practices and to add to the risk incident to housing production. The result is not only that less housing will be produced at increased cost, but also that entry into the housing market will be an experience reserved for the exclusive few.

2. The *San Diego Gas & Electric Co.* decision poses a serious threat to the integrity of the individual right of property. It is the position of amicus that the burden of promoting the public good should not be borne, even if only for an interim period (*i.e.*, the period when the offending regulation is effective), by a single landowner.

To impose such burden would defeat the distributional policy of the Just Compensation Clause. The Fifth Amendment guarantee that private property shall not be taken for a public use without first paying just compensation is grounded in the belief that government should not be allowed to force some people to bear the costs of achieving some public good which should be borne by the public as a whole. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). As this Court stated in *United States v. Fuller*, 409 U.S. 488, 490 (1973), "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness [citations omitted], as it does from technical concepts of property law." To require the individual landowner to bear the burdens associated with promoting public goals such as open space preservation or preservation of scenic vistas along the California coast would violate the principles of fairness upon which the Just Compensation Clause is based.[3]

Amicus does not herein argue the question of what degree of regulation effects an unconstitutional taking. The concern is with preservation of a property right once infringement of the right has been determined in court. An effective means for the protection of property rights must be available. The right of property must be guarded as is every other right within the penumbra afforded constitutional protection. *See Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965). "That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Moreover, the Court in *Owen v. City of Independence, Missouri*, 48 U.S.L.W. 4389, 4397-99 (1980), has enumerated several

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[3]*See* Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553 (1972); Baumgardner, "Takings Under the Police Power —The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances," 30 Sw. L. J. 723 (1976).

important public policy reasons supporting the availability of the damages remedy to correct violations of basic civil rights. Inasmuch as a person's right to property is recognized as a basic civil right, the public policy reasons announced by the Court in *Owen* regarding the need for the damages remedy are applicable here. The remedy of invalidation is not sufficient by itself to safeguard the constitutional guarantees contained in the Fifth Amendment and to effectuate the distributional policy of the Just Compensation Clause. Elimination of the damages remedy strikes at the very heart of the institution of private property.

3. The policy concerns which provided the basis for the California Supreme Court's elimination of the inverse condemnation remedy in *Agins* assume that there is a higher importance in achieving varying public goals than in maintaining the integrity of basic constitutional guarantees. The perceived threat of fiscal harm to municipalities and the chilling impact on the land use planning process cannot justify the evisceration of constitutional rights. This Court repudiated the chilling impact argument in *Owen* in the Civil Rights Act context. Amicus urges the Court similarly to repudiate the argument in the context of Fifth Amendment violations.

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, dated June 26, 1979, is unreported. A copy of the opinion is attached as Appendix G to the Jurisdictional Statement.

STATEMENT OF THE CASE

Amicus curiae adopts the statement of the case as it appears in the brief for appellant.

ARGUMENT

I

THERE IS A PROFOUND NEED FOR A WIDE RANGE OF EFFECTIVE REMEDIES TO SAFEGUARD THE INTERESTS OF THE PROPERTY OWNER AND THE HOUSING CONSUMER

A. Effective Remedies Are Needed to Prevent Exclusionary Land Use Practices

Perhaps the darkest side of land use regulation and the exercise of the police power is the use of such regulatory powers by municipalities to exclude certain socio-economic segments of society. It is all too apparent that environmental regulations, such as open space ordinances, may be motivated not so much by a concern for the physical environment, as a concern for preserving and maintaining the exclusivity of the community. Recent studies have demonstrated that local governing bodies have used restrictive development standards to serve purely local interests. The National Commission on Urban Problems noted in *Building the American City* (1968), that:

> "Most communities want all cream and no skim milk. They want the best, not only in physical structures and facilities, but also in the *economic* levels of people who will become their future citizens . . . . Each community engages in one-upmanship; attempting to outdo its neighboring communities." *Id.* at 19 (emphasis added).

The proliferation of this attitude is described in the Rockefeller Brothers Task Force study, *The Use of Land: A Citizens Policy Guide to Urban Growth* (1973). The report states:

> "In the midst of a mobile and expanding population, local governments represent the people already there. Prospective residents, who may be destined to double or treble the population of the community, do not live within local boundaries and therefore do not vote. The

local government thus speaks for the people who got there first.

> "Many of these first arrivals have recognized for years that additional development has little to offer them. *Some suburbs have engaged in a curious intermunicipal competition in which development (particularly low- or moderate-income housing) has been perceived as the common enemy, threatening to overrun the weak or inattentive locality. Municipal efforts to combat the threat have resembled nothing so much as competitive dikebuilding by neighboring landowners, each hoping that his higher dikes will keep the floodwaters off his own land and drive them onto his neighbors' instead.*" *Id.* at 225-26 (emphasis added).

Perhaps this parochial attitude is the reason why in recent years the courts have been faced with an increasing number of exclusionary zoning cases and have been forced to grapple with ordinances which limit development and effectively exclude people from suburban communities. *See Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); *Appeal of Kit-Mar Builders, Inc.*, 268 A.2d 765 (1970) (two to three acre minimum lot size); *Appeal of Girsh*, 263 A.2d 395 (1970) (prohibition of apartment buildings); *National Land & Investment v. Kohn*, 215 A.2d 597 (1965) (four acre minimum lot size); Rose, *After Mount Laurel: The New Suburban Zoning* (1977).

Restrictions on the supply of land have such an integral relationship to the cost of housing that it does not require a particularly adroit municipality to structure a land use regulation which subtly excludes any designated segment of society.

Invalidation of such selfish and shortsighted municipal regulation is an available remedy to attempt the correction of exclusionary municipal practices. This remedy by itself, however, is not wholly adequate to solve the problem.

It is the position of amicus that a full panoply of effective remedies, including the damages remedy, must be available to insure meaningful relief, to serve as a deterrent to municipal circumvention of constitutional rights in the enactment of land use regulations, and to create conditions in which housing for poor, moderate, and middle income people will be produced. The Supreme Court of New Jersey in *Southern Burlington County NAACP*, 336 A.2d at 734, described the situation aptly:

> "Courts do not build housing nor do municipalities. That function is performed by private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government. The municipal function is initially to provide the *opportunity* through appropriate land use regulations . . . ." (Emphasis added.)

Conditions favorable to the provision of housing for all economic segments of society have been advancing slowly in this country. This Court first invalidated a zoning ordinance specifically prohibiting occupation by "persons of color" in *Buchanan v. Warley*, 245 U.S. 60 (1917). While in *Buchanan* the Court focused on the rights of the property owner, this Court subsequently has focused on the civil rights of the excluded minorities and has utilized the Equal Protection Clause of the Fourteenth Amendment to outlaw state and local measures effectuating racial discrimination. *See, e.g., Reitman v. Mulkey*, 387 U.S. 369 (1967); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The Federal Circuit Courts have also been active in invalidating zoning legislation motivated by a desire to promote racial segregation. *See, e.g., Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Kennedy Park Homes Association, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 91 S. Ct. 1256 (1971).[4]

[4]*See* Babcock, Richard F. *Exclusionary Zoning* (Praeger, 1973) at 33-34. Babcock details decisions which have voided legislation designed to further racial segregation.

It is the goal of amicus to ensure that housing opportunities are provided through the adoption of responsible and appropriate land use regulation. A wide range of citizen remedies are necessary to ensure that such opportunities are provided. Progress has been made in alleviating outright discrimination. To eliminate the damages remedy for unconstitutional violations of personal property rights portends regression and jeopardization of that progress which has been made in ensuring responsible and accountable land use regulation. If allowed to stand, the California court's decision would be an impediment to continued progress.

B. Invalidation By Itself Is Wholly Inadequate to Protect Personal Interests in Property

The invalidation remedy must be viewed from two perspectives: first, the landowner, and second, the housing consumer. Amicus strongly urges that there is no real relief provided to the landowner by the invalidation remedy afforded by the California courts. Moreover, it is not particularly effective, by itself, as a deterrent to the circumvention of constitutional rights. It is illusory at best and, in practice, actually perpetuates the injury imposed by the invalidated ordinance.

1. Invalidation Returns the Problem to the Entity Which Caused It In the First Place

It is fair to presume that the public objective which has been thwarted by invalidation of the ordinance enacted for its achievement remains. Thus, it is likely that a public agency will pursue the objective through enactment of still another ordinance. The landowner who has won "relief" from the first ordinance will be burdened anew, albeit to a greater or lesser extent.

Similarly, although the public interest group representing the poor and minorities may manage to set aside exclusionary land use regulations, it is then faced with the fact that traditionally the role of the court has been essentially negative in character. The court may invalidate the offending regulation, but it has not granted definitive relief and prescribed the affirmative measures necessary to create housing opportunities. *See, e.g., Southern Burlington County NAACP*, 336 A.2d at 734.

While a few courts have been willing to sit as super planning agencies or zoning boards of appeals, most courts have been reluctant to perform such roles. Invalidation thus forces the housing litigant from courtroom to planning board to courtroom and back again. This process, more commonly known as the "zoning-amendment shuffle," may cause such utter frustration that, in the end, not a single affordable housing unit is built. *See* Mytelka, Arnold K., "Judicial Remedies" in *After Mount Laurel: The New Suburban Zoning*, at 150, 152 (Center for Urban Policy Research, 1977).[5]

The invalidation remedy thus can have devastating practical effects both on the property owner and those in search of affordable housing. While attempted resolution of the controversy continues indefinitely, the landowner is deprived of the fruitful use of his property, and housing consumers are denied meaningful opportunities to obtain affordable housing. In the absence of active judicial inter-

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[5]In this regard it should be noted that while the court may enjoin enforcement of the unconstitutional ordinance, the municipality may retaliate and enact a moratorium, pending reconsideration of the challenged ordinance. *See, e.g.*, Cal. Government Code § 65858 which permits enactment of a moratorium for up to two years in contemplation of amendments to zoning ordinances or general plans. This renders the invalidation remedy all the more ineffectual against arbitrary and capricious action.

vention in the zoning-land use planning and regulation process, invalidation is frequently a Pyrrhic victory devoid of meaningful relief for both the landowner and the housing consumer.

2. Invalidation Does Not Achieve the Cost Distribution Objective of the Just Compensation Clause

The cost distribution objective of the Just Compensation Clause has long been upheld by this Court. *Armstrong v. United States*, 364 U.S. at 49.

In the aftermath of litigation resulting in invalidation, and during that period when the municipality seeks a legitimate means to achieve the objectives embodied in the challenged ordinance, the impacted landowner is shouldering a burden which should be borne by the community as a whole. The burden is evidenced by the wrongful denial of the private use of his land in order to further some public purpose. This is sacrificing the individual to the community. Even at the moment the court concludes that the landowner is paying more than his fair share, and for that reason invalidates the ordinance, the inequity continues. Thus, invalidation does not provide the protection which is the basis for the just compensation guarantee. There is a total failure to distribute the loss.

This is to be contrasted with the remedy of inverse condemnation. Under that remedy, the burden of providing a public benefit or preserving a public resource would not be borne exclusively by the individual property owner. The cost of providing such benefits would be distributed equitably among the ultimate beneficiaries of the regulation, the entire community.

C. Restriction of Judicial Remedies In the Land Use Context Will Detrimentally Affect the Nation's Housing Consumers

The elimination of the inverse condemnation remedy allows cities and towns to exclude housing through zoning ordinances without any significant fear of adverse financial consequences. It enhances the ability of municipalities to obstruct the migration of racial minorities and low income families from the central cities to suburban areas, to impede the acquisition of decent housing, and to restrict the opportunity for an improved quality of life. The restriction of remedies must therefore be characterized as contrary to the public interest.

The importance of home ownership to most Americans cannot be understated. Traditionally, owning a home is a goal which has been actively pursued not only because it is considered the preferred mode of housing, but also because it is viewed as symbolic of having realized the much sought after American way of life.[6] Over the years, this goal has not waned. Increasingly, however, the upwardly spiraling cost of home ownership has dampened or dashed the housing aspirations of large segments of the population.

Recent statistics indicate that in 1976 the median price of housing in the State of California was $47,160.[7] Currently, the figure stands at $98,994.[8] This represents an increase in excess of 100% in the last four years. In contrast, the median household income in 1976 was $14,000[9]

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[6]Frieden, Bernard J., "The Environmental Protection Hustle, The Massachusetts Institute of Technology" (1979) at 1.

[7]California Association of Realtors, "California Real Estate Trends Newsletter," Vol 1, No. 5 (July 10, 1980).

[8]California Association of Realtors, *supra* note 7.

[9]Department of Housing and Community Development, "California Statewide Housing Plan, 1977" at C-48.

and presently is $18,400,[10] a 31% percent increase for approximately the same time period. The foregoing figures clearly reveal that income has not kept pace with the cost of housing. Furthermore, the increases in the median cost of housing, in large part, have eliminated the supply of low cost housing. The net effect is that home ownership is eluding a greater number of Americans on a daily basis.

While several factors have contributed to the escalating cost of housing in the 1970's, government regulations and particularly those relating to growth restrictions and the preservation of open space, have combined to limit and delay new housing starts, to raise its cost, and to restrict the availability of low and moderate income housing.[11] Numerous studies have documented the inflationary impact of housing regulation.[12] They point out that government policy and regulation have been significant factors responsible for the creation of a housing scarcity. This scarcity has forced prices to escalate, and results in a pronounced reduction in the number of people who can buy new homes.[13] What formerly was a goal that most could achieve,

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[10]Department of Housing and Community Development, "California Statewide Housing Plan 1979 Update" 78 (December, 1979).

[11]Frieden, *supra* note 6 at 10.

[12]*See, e.g.*, Schwartz, Hansen, Green, Moss and Belzer, *The Effect of Growth Management on New Housing Prices: Petaluma, California* (hereinafter Petaluma Report), Institute of Government Affairs, Institute of Ecology, and UCD Kellogg Program, University of California, Davis (1979); Urban Land Institute and Gruen, Gruen & Associates, *Effects of Regulation on Housing Costs: Two Case Studies,* Washington, D.C., Urban Land Institute (1977); and Seidel, Government Regulations and Housing Costs, Rutgers University Center for Urban Policy Research (1977).

[13]The Petaluma Report concludes that single family houses built in Petaluma after growth management were fewer in number, larger, and more expensive (in constant dollars) than those built before growth management. Petaluma Report, *supra* note 12 at 59. The Urban Land Institute and Gruen, Gruen & Associates' study

is now one that is reserved for the exclusive few. The escalating cost of housing has had an even more egregious impact on blacks and other minorities. While such groups were previously excluded from the housing market by blatantly discriminatory legislation, minorities now find themselves confronted with a more subtle, but equally effective, vehicle for exclusion—land use regulatory policies. The *San Diego Gas & Electric Co.* decision will only exacerbate the problem by immunizing governmental officials from liability for their actions.

Perhaps the most far reaching consequence of overly restrictive land use regulation is elimination of the social and economic mobility which may be attained through home ownership. Restrictive land use policies which frustrate the ability of the construction industry to meet housing demand will be responsible for a continuing deterioration of housing conditions. New construction helps those most in need of improved housing conditions and makes possible upward mobility by way of housing filtration. The importance of the filtration process, which results from the construction of new housing, has been demonstrated by a study conducted by the Survey and Research Center at the University of Michigan.[14] The study reveals that the construction of one new unit makes possible a succession of three and one-half moves to different and potentially improved housing accommodations. Thus, the construction of new housing units benefits a greater number of people indirectly than it does directly. Additionally, the study indicates that those most likely to be the indirect recipients of the benefits inhering in the filtration process are those in

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points out that "stringent development constraints have resulted in heavy competition for scarce housing and price increases of 25-100 percent per year." Urban Land Institute, *supra* note 12 at 1.

[14]Lansing, Clifton, and Morgan, supra note 1.

the low and moderate income categories. The housing opportunities for those income groups will be further reduced if the filtration process is inhibited by restrictive regulations on the construction of new housing.

The *San Diego Gas & Electric Co.* decision further frustrates the interests of those in search of affordable housing by increasing the risks associated with the production of housing. The result is inflated housing prices. Where the provision of housing becomes a high risk undertaking, due to the probability, for example, of delay, lengthy litigation to overturn invalid regulations or arbitrary and capricious governmental action, that risk factor is ultimately passed on to the consumer. Economist Paul Samuelson expresses the point as follows:

> "If people generally act like risk averters . . . they will prefer smaller steady incomes to erratic incomes even when those average out to a higher figure. Therefore, economic activities that involve much uncertainty and risk . . . will be forced by comparative entry and exit of risk takers to pay, over the long run, a positive profit premium to compensate for aversion to risk. The yield on capital invested in such industries will involve, in addition to pure interest corresponding to safe investments, an extra element corresponding to positive profit."[15]

The added risk factor can have another effect, equally detrimental to the housing consumer. In the face of a multi-level review procedure, the chances of obtaining project approval are as slim as the risks associated therewith are great. Few are therefore in a position to take such risk. The rewards, however, for those who survive the reviews are many. For the survivors, a virtual monopoly on new housing starts is guaranteed and the homes which result

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[15]Samuelson, *Economics: An Introductory Analysis* 604 (6th ed. 1964).

can be marketed at prices dictated by the monopoly holder. Regulation is thus eliminating competition in the homebuilding industry. Frieden describes the problem as such:

> "Formerly, developers had to compete against each other for the consumer's dollar and competition kept prices down. Now developers compete against each other for building permits. But once a developer has his permit in a place where local housing demand is strong, there is so little competition in the marketplace that he can earn enough profit to make the risk worth taking."[16]

In either scenario, it is the housing consumer that is injured by the added risk factor insofar as it discourages entry into the housing market, reduces housing competition, and results in less housing at higher prices. The *San Diego Gas & Electric Co.* decision, by creating uncertainty and exacerbating market disequilibrium, adds significantly to a critical housing problem. The problem is evidenced by the impassioned cry for rent control ordinances, condominium conversion ordinances, and similar regulations.

Exclusionary land use policies have proliferated under the guise of environmental regulation. Typically, land use regulations have been promulgated in response to the articulately phrased arguments of growth opponents that homebuilding results in adverse environmental impacts. However, homebuilding does not have to conflict with basic conservation goals. The real motivation of growth opponents is often found in the desire to maintain the status quo and the exclusivity of the community. Just as this Court has forbidden exclusion clearly based on race or national origin,[17] so should this Court disallow and deter

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[16]Frieden, *supra* note 6 at 150.

[17]*See, e.g., Buchanan v. Warley,* 245 U.S. 60 (1917); *Hunter v. Erickson,* 393 U.S. 385 (1969); *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Shelly v. Kraemer,* 334 U.S. 1 (1947); *Oyama v. California,* 332 U.S. 633 (1948).

exclusion which is solely motivated by a municipal desire to further purely parochial aims to the detriment of the economically disadvantaged. A wide range of remedies is necessary to ensure municipal responsibility as well as accountability.

II

THE FEDERAL CONSTITUTION THROUGH THE JUST COMPENSATION CLAUSE GUARANTEES THE AVAILABILITY OF THE MONEY DAMAGES REMEDY TO PROTECT PERSONAL RIGHTS IN PROPERTY

A. Protection of Personal Rights In Property Against Government Intrusion Is a Fundamental Precept of the Federal Constitution

For nearly two centuries, American political scientists and legal scholars have pointed to protection of personal rights in property as the fundamental motivation for adoption of the Federal Constitution.[18] In keeping with the drafters' intentions, express constitutional restrictions on governmental interference with private property have been augmented by court-made doctrine. Nineteenth century jurists broadly construed the Contract Clause, United States Constitution, Article I, Section 10, as a means of protecting vested property rights against unjust state interference. *E.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819). Later, this Court turned to the Due Process Clause of the Fifth Amendment as a restriction on economic legislation. *Mugler v. Kansas*, 123 U.S. 623 (1887). This Court has unambiguously indicated that the Fifth Amendment guarantee that private property shall not be taken for public use without just compensation op-

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[18]*See*, Sugan, Bernard, *Economic Liberties and the Constitution* (University of Chicago Press 1980) Chapters 2-4. A copy of the manuscript has been lodged with the Court.

erates as a limitation on the exercise of the police power. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). As stated by Justice Holmes:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415.

Despite the safeguards created by this Court, states and political subdivisions have, during the past 50 years, made disturbing inroads on the institution of private property. Through a multitude of regulatory programs, personal rights in property have been compromised and sometimes totally disregarded.

Without question, personal rights in property are held subject to society's right to be assured of public health, safety, and welfare. With the growth of cities and concomitant increase in urban density, public versus private conflicts were inevitable. The notion of which subjects are appropriate for regulation has necessarily expanded. As this Court stated in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), "In a changing world, it is impossible that it should be otherwise."

Although an individual's freedom to use, enjoy, and derive profit from property has been severely diminished, the person whose property interests have been subject to regulation which goes "too far" has not been without an effective remedy. In the land use regulatory context, the remedy of money damages is required by the Fifth Amendment. By this constitutional provision, the landowner is guaranteed just compensation when his property is taken.

Without question land use regulations can effect a "taking." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). In the event that it does, logical application of the constitutional guarantee

requires either that the "taking" be eliminated or that just compensation be provided. Invalidation of an offending regulation neither removes the "taking" (*see* Argument I(B)(2), *supra*), nor provides compensation. The inverse condemnation remedy on the other hand provides the required just compensation. Therefore, unless an offending regulation can be challenged by inverse condemnation, a person has no means of enforcing his constitutionally guaranteed rights. Without the remedy, the Just Compensation Clause would be meaningless in the land use regulatory context. This compels the conclusion that the availability of inverse condemnation to challenge a land use regulation is affirmatively required by the clause. *See Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978); *Kaiser Aetna v. United States,* 48 U.S.L.W. 4045 (1979); *Gordon v. City of Warren,* 579 F.2d 386 (6th Cir. 1978); *Dahl v. City of Palo Alto,* 372 F. Supp. 647 (N.D. Cal. 1974); *Richmond Elks Hall Association v. Richmond Redevelopment Agency,* 561 F.2d 1327, 1330-32 (9th Cir. 1977); *Arastra v. City of Palo Alto,* 401 F. Supp. 962 (N.D. Cal. 1975); *decision vacated by stipulation of parties,* 417 F.Supp. 1125 (1976).

B. The Policy Reasons for Holding Municipalities Liable for Damages Pursuant to 42 U.S.C. § 1983 Announced By This Court In Owen v. City of Independence, Missouri, Supra, Are Equally Applicable to Violations of Personal Property Rights Guaranteed By the Fifth and Fourteenth Amendments

In *Lynch v. Household Finance Corp.* 405 U.S. at 542, 552, this Court rejected any distinction between personal liberties and property rights and made it clear that the rights protected by the Fourteenth Amendment are in fact "basic civil rights." The Court quoted from *Shelley v. Kraemer,* 334 U.S. 1, 10 (1948), as follows:

> " 'It cannot be doubted that among the civil rights intended to be protected from discriminatory state action

> by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.'" *Lynch*, 405 U.S. at 544.

This Court pointed out further in *Lynch* that

> "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch*, 405 U.S. at 552.

In *Owen v. City of Independence, Missouri, supra,* this Court held, interpreting 42 U.S.C. § 1983 and its forerunner, the Civil Rights Act of 1871, that a municipality has no immunity from liability under Section 1983 for its constitutional violations and that it may not assert the good faith of its officers as a defense to such liability. The Court set forth several public policy reasons why the money damages remedy should be available against municipalities and why it should reject arguments in support of a qualified municipal immunity. Since the source of civil rights guarantees is the Fourteenth Amendment, the policy reasons supporting the unqualified extension of the damages remedy under the Civil Rights Act apply equally to violations of the Fourteenth Amendment.

In *Owen* the Court identified the following public policy concerns:

> "A damages remedy against the offending party is a vital component of any scheme for vindicating

> cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrong-doer is the institution that has been established to protect the very rights it has transgressed. . . . Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated. [Footnote omitted.]" *Owen*, 48 U.S.L.W. at 4397.

The Court also stated:

> "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. [Footnote omitted.] Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of *unintentional* infringements on constitutional rights. [Footnote omitted]" *Owen*, 48 U.S.L.W. at 4397 (emphasis added).

Rights in property should enjoy no less protection under the Federal Constitution than any other civil right. Equality in the enjoyment of property rights is to be furthered not only by the Civil Rights Act, but by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. at 10. The preceding public policy considerations which provide the basis for extending monetary liability to municipalities for civil rights violations under Section 1983, apply equally to property rights violations under the Fifth and Fourteenth Amendments. There is no compelling reason to immunize municipalities or municipal officials in either situation. In both situations constitutional guarantees need to be protected and vindicated. There is an identity of interest in preventing further injurious conduct and a need to minimize the likelihood of unintentional infringements of constitutionally guaranteed civil rights.

The same considerations of fairness related to the distribution of loss occasioned by unconstitutional action as discussed in *Owen* are applicable in the context of Fifth and Fourteenth Amendment violations. In *Owen*, this Court considered decisions conferring qualified immunity on various government officials and determined that public policy reasons for conferring immunity are not applicable where the liability of the municipal entity is at issue. The Court stated:

> "It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby.
>
> . . . .
>
> ". . . [E]ven where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Owen*, 48 U.S.L.W. at 4398.

Just as Section 1983 of the Civil Rights Act is intended to properly allocate the costs associated with constitutional violations amongst the victim, the municipal entity and the public as represented by the municipal entity (*Owen*, 48 U.S.L.W. at 4399), so too is the Just Compensation Clause of the Fifth Amendment intended to

> "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In the same vein, this Court has previously announced that

> "[t]he Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie within the path

of the project." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

The distributional policy found by the Court to exist in Section 1983, and to be furthered by its decision in *Owen, supra*, is basic to the Just Compensation Clause. The same *means* identified by the Court in *Owen* to realize the policy embodied in Section 1983 are required to fully achieve the distributional policy of the Just Compensation Clause and the protections afforded by the Fourteenth Amendment.

III

THE "CHILLING EFFECT" RATIONALE ASSERTED AGAINST AVAILABILITY OF THE MONEY DAMAGES REMEDY CAN NEVER JUSTIFY CIRCUMVENTION OF FEDERALLY GUARANTEED RIGHTS

The California Supreme Court in *Agins v. City of Tiburon*, upon which the decision appealed from herein relies, set forth several policy reasons for elimination of the damages remedy in the regulatory context. It indicated that in reaching its decision it was persuaded by "the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy." *Agins*, 24 Cal. 3d at 276-77. This Court is urged to closely scrutinize the "chilling impact" rationale. Amicus submits that this rationale is not compelling when viewed in the light of the constitutional rights to be protected.

The California Supreme Court's opinion in *Agins* reflects an overriding concern for the impact on the public fisc and an insensitivity to the impact on the property owner of the court's preferred remedy, invalidation. This attitude underscores an improper approach to adjudication involving the just compensation guarantee. This Court has indicated that the economic impact of regulation on the

claimant is of "particular significance" in resolving controversies arising under the Just Compensation Clause. *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. The California Supreme Court in *Agins* ignored this significant factor.

Damage awards for regulatory takings might, in some cases, impose financial hardship on municipalities, but that alone cannot justify the denial of constitutional protection to the individual landowner. The costs of education, welfare, health services, transportation, and other services heavily burden local governments. Provision of open space and allocation of land use in general should not be treated differently. "Interfering with the individual rights of a few property owners will not solve the financial crises of our state and local governments."[19]

This Court considered the chilling impact argument in the context of damage awards for civil rights violations in *Owen v. City of Independence, Missouri, supra.* The majority rejected the chilling impact argument and stated:

> "First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. [Citation omitted.] More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at

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[19]Badler, "Municipal Zoning Liability in Damages—A New Cause of Action," 5 Urban Law 25, 44 (1973).

> some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator put it, 'Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions.'" *Owen*, 48 U.S.L.W. at 4398 (emphasis in original).

Amicus urges this Court to view the chilling impact arguments set forth in the California Supreme Court's opinion in *Agins* in the light of its pronouncements in *Owen*.

CONCLUSION

The *San Diego Gas & Electric Co.* decision has placed in jeopardy the fundamental constitutional right of property. This is a right of individual liberty. *Lynch*, 405 U.S. at 552. The availability of a remedy in inverse condemnation to challenge regulatory action is essential to the protection of that right and, further, is essential to protection from governmental abuse and discrimination. If allowed to stand, the decision will dilute the positive achievements which have been made in guaranteeing personal liberties, insuring socio-economic advancement, and creating opportunities for improved housing conditions. The interests which have been advanced as providing the basis for immunizing communities from financial liability cannot warrant abrogation of these fundamental rights and interests.

For the foregoing reasons amicus curiae Urban League respectfully urges that the *San Diego Gas & Electric Co.* decision be reversed.

Respectfully submitted,

RONALD A. ZUMBRUN
THOMAS E. HOOKANO
COUNSEL OF RECORD
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae San Diego Urban League, Inc.

ELLEENE A. KIRKLAND
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Of Counsel

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OF THE

United States

OCTOBER TERM 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellants,

VS.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE, CITY OF SAN JOSE, CALIFORNIA, NATIONAL LEAGUE OF CITIES, AND OTHER JOINING CITIES OF CALIFORNIA, IN SUPPORT OF APPELLEE

ROBERT J. LOGAN
CITY ATTORNEY
COUNSEL OF RECORD
GARY B. REINERS
SR. ASSISTANT CITY ATTORNEY
151 W. Mission Street
San Jose, CA 95110
Tel. (408) 277-4454
Attorneys for Amicus Curiae

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7662

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No. 79-678

In the Supreme Court

OF THE

United States

OCTOBER TERM 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellants,

VS.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE, CITY OF SAN JOSE, CALIFORNIA, NATIONAL LEAGUE OF CITIES, AND OTHER JOINING CITIES OF CALIFORNIA, IN SUPPORT OF APPELLEE

STATEMENT OF THE CASE

Amicus curiae adopt in full the statement of the case made by appellee City of San Diego (hereinafter "San Diego").

INTEREST OF AMICI CURIAE

A decision in this case favoring claims in inverse condemnation based on police power regulation will undoubtedly shape the character and conduct of land use from this point forward. Although the legal issues raised are of constitutional stature and thus of great importance, the practical consequences that could flow from the decision are of even greater dimensions. The very face of urban and suburban America may be altered in the future by the decision in the case at bar.

Amicus Curiae City of San Jose, the cities participating individually in this brief, and all those cities represented by Amicus National League of Cities all have one thing in common. They are in the forefront of land use regulation. They are, if you will, "where the buck stops." San Jose and many other cities have been fiscally impacted by the costs of defending against inverse law suits. The costs of defense alone can be astronomical. When a judgment in favor of a landowner results, fiscal impact can become fiscal trauma.

A decision by this Court establishing a comprehensive inverse condemnation remedy would affect every city, town and hamlet in this country. Whether a city is currently affected by growth problems or not, it still has its land use squabbles. To the extent that a sharp sword could be placed in every landowner's hand by the establishment of a comprehensive inverse condemnation remedy, every community is this nation has a very real interest in the outcome of this case.

SUMMARY OF ARGUMENT

The cornerstone of logical growth in a modern, complex society is the imaginative and rational application of land-use planning techniques. Now, more than ever, there is a direct interrelationship between sound land-use policies and energy, resources, recreation, and the environment.

Amici curiae are, in varying degrees, the focal point of most real battles over land use. Traditionally, local legislators have been assured substantial discretion in reaching the often difficult decisions necessary to confront the responsibility thrust upon them by modern society. Not every decision is perfect—far from it. There are even those decisions that unintentionally exceed the bounds of their discretion.

Yet it is often very difficult to separate the good decisions from the bad, and even harder . . . "to develop a 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 57 L.Ed.2d 631 (1978).

Amici curiae suggest that *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 67 L.Ed. 322, never intended to require that invalid police power regulation inexorably lead to a cause of action or claim for relief for monetary compensation. The holding in *Pennsylvania Coal* should be reevaluated. The decision does not support what it has come to stand for. The result has been utter confusion in attempting to interpret its meaning—without benefit to either the government or the landowner.

Case law following *Pennsylvania Coal* has never accepted the remedy of forced purchase for adoption of excessive regulation without intended public use, even where diminution of property values has resulted. In addition, a forced purchase remedy in inverse condemnation is inconsistent with the statutes in many states permitting abandonment of direct condemnation action.

Amici urge that the preferred remedy for overzealous regulation is invalidation. Invalidation has always been an accepted remedy in non real property cases where excessive regulation has resulted in economic loss. There is no reason to apply a different standard where real property is involved. Such a remedy avoids the "chilling" effect that potential inverse liability has on innovative planning; it avoids judicial usurpation of the legislative prerogative; it avoids the onerous impact on judicial administration by disposing of long, unnecessary and often harassing lawsuits.

A decision consonant with *Amici's* argument would ensure proper maintenance of the traditional separation of powers. Courts are ill-equipped to make land use decisions. To impose new burdens on the courts in this area would administratively overburden the judicial system. At a time when local judicial systems are being challenged by popular discontent, and their traditional independence is being attacked, an expansion of judicial involvement in local legislative actions like the one at bar only exacerbates the growing threat to the constitutional doctrine of separation of powers at the local level.

Lastly, the case at bar suffers from the same defect as *Agins v. City of Tiburon*, ... U.S. ....., 65 L.Ed. 2nd 106

(1980) has considerable use of the property if it is considered as a whole.

ARGUMENTS

I

PENNSYLVANIA COAL IS OF DUBIOUS VALUE AS PRECEDENT IN THE DECISION OF TODAY'S LAND USE REGULATION CASES

The famous observation of Mr. Justice Holmes in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415; 67 L.Ed. 322, 326 (1922) has become for appellants a magic phrase.

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . ." 260 U.S. 393 at 415.

Amici admit that Holmes' famous formula has become black letter law. However, *amici* strenuously urge that it is not susceptible of practical application, with the result that it has become primarily used as *obiter dictum* rather than as a foundation for consistent decisions arriving at the same result as *Pennsylvania Coal.*

There are a number of compelling reasons why *Pennsylvania Coal* does not provide a firm foundation or really any foundation at all, for an expansive decision by this court on the subject of police power regulation. First, Justice Holmes, the author of the phrase, seemed to deliberately leave it vague and did not support it with case authority. Second, the status of land as a social interest has changed dramatically since the 19th Century when Holmes formulated his thinking. Third, even after strenuous efforts

by a legion of learned commentators over the past half century, the Holmes formula has not resulted in a set of meaningful criteria with which society can predict results in this area.

A. The Holmes Opinion In Pennsylvania Coal Cannot Be Harmonized With Its Own Contemporaries

One of the fundamental reasons why the primary use of *Pennsylvania Coal* has been as *obiter dictum* in cases arriving at a different result is that it was an anomaly when written. A brief review of Justice Holmes' dissenting opinions in the landmark cases of *Lochner v. New York,* 198 U.S. 45 (1905); *Adkins v. Children's Hospital,* 261 U.S. 525 (1923), and *Truax v. Corrigan,* 257 U.S. 312 (1921), points out very clearly that Justice Holmes' remark in *Pennsylvania Coal* was seriously at odds with his prevailing judicial philosophy concerning deference to legislative determinations. The following passage from *Truax, supra,* indicates dramatically his attitude towards legislative discretion:

> "There is nothing I more depreciate than use of the 14th Amendment beyond the absolute compunction of its words to prevent the making of social experiments that an important part of the community desires . . . ." 257 U.S. 312 at 343.

It is entirely possible that Holmes' holding in *Pennsylvania Coal* was a reaction to a deep seated conviction about the contractual nature of land ownership. Holmes himself in a letter stated:

> "My ground (for decision) is that the public (i.e. the residential property owners) only got on this land by

> paying for it and that if they saw fit to pay only for the surface rights they can't enlarge it . . . ." *Holmes-Pollack Letters,* Mark de Wolf Howe (ed.), 108-109 (1941).

Perhaps Holmes himself was unintentionally revealing his bias when he wrote the opinion in *Block v. Hirsch,* 256 U.S. 135 (1920) upholding a rent control law challenged by landlords.

> "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed, ..." 256 U.S. 135 at 155.

Some courts have distinguished away *Pennsylvania Coal* (while affirming its holding) by focusing on this aspect. For example in *McCarthy v. City of Manhattan Beach* (1953) 41 Cal.2d 879, *cert. den.,* 348 U.S. 817 (1954), the California Supreme Court characterized the *Pennsylvania Coal* action as: ". . . an action between two private parties, where the statute under attack admittedly destroyed previously existing right of property and contract . . . ," 41 Cal.2d 879 at 891.

B. The 1980's Model "Bundle of Sticks" Is Not the Same as the 1880's Model "Bundle of Sticks"

If Justice Holmes was transfixed by a special feeling for relationships involving real property, he was reflecting an ideological bias in favor of land, the only "real" property of traditional society. It is undeniable that in traditional society land did occupy a special place as not only the source of most wealth, but also as the framework for social activity and obligation. Yet, it is a very long way

indeed from the world of Blackstone to the world in which today's Blackacre exists. Land is no longer the basis for the social bond. Industrialization, mass education, and consumerism have long since made land more *an index* of wealth, rather than the sole source of it.

Modern land developers are business entrepreneurs, who treat land exactly the same way as other entrepreneurs treat other commodities. This observation is not intended to be pejorative, nor can it be in a nation that has grown strong and wealthy from the efforts of entrepreneurs. However, it does point out the inconsistency of appellant's arguments that the regulation of land should be treated as something separate and apart from other economic regulations that are judicially reviewed under a different standard.

In another way land has been changed in status over the past one hundred years. In the 19th century there was more land in the United States than the young nation could fully occupy. In 1980, in the minds of some, the situation is reversed: too many people on too little land. Because of this perceived scarcity, land has become in a very real sense "affected with the public interest." In a profound practical and philosophical sense land is the ultimate "common carrier". Yet appellants urge this court to bind the hands of government with respect to the regulation of land, while this Court permits great latitude in the regulation of freight trains and trucks.

In an era when much investment in land is characterized as "tax shelter" for the real wealth (and income) of the owner, even the conceptual and psychological bases for

the Holmesian distinction have been lost. With its basis gone the distinction is no longer tenable.

C. The Reasoning of Pennsylvania Coal Has Proved Inadequate To Serve As A Basis For Any Rational Analytical Framework

This court has recently acknowledged in *Penn Central Railroad Company v. City of New York*, 438 U.S. 104 (1978) that it has been unable to develop a "set formula" for determining when a regulation has transgressed the bounds of validity.

The commentators reviewing the case law based on *Pennsylvania Coal* have been somewhat less charitable. Professor Allison Dunham has characterized the cases as "a crazy quilt pattern" that has led to "floundering and differences among judges, and among generations of judges." Dunham, "*Griggs v. Allegheny County* in Perspective: 30 years of Supreme Court Expropriation Law" (1962) 63, *Sup. Ct. Rev.* 105. For Professor Arvo Van Alstyne "the decisional law is largely characterized by confusing and incompatible results often explained in conclusionary terminology, circular reasoning, and empty rhetoric." Van Alstyne "Taking or Damaging by Police Power: The Search For Inverse Condemnation Criteria", 44 So. Cal. L. Rev. 1 (1970).

Admittedly the area of police power regulation/inverse condemnation is conceptually the most difficult area of "taking" jurisprudence. The other three main categories of "takings" are much easier both to define and apply. An intended physical invasion of property by government

raises no problems. Neither does an unintended physical invasion. Both of these result from objectively discernible causes with objectively measurable results. The third category, where property suffers either an intangible detriment to value resulting from a governmental act (*e.g.*, loss of street frontage resulting from relocation of a street), or a non-physical invasion (*e.g.*, aircraft noise from government overflights) is more difficult. However, even in this type of case, there is always a physical act of government that intends a result.

For appellant to use, as it has, precedents arising from these three relatively settled areas of inverse condemnation liability not only confuses the present issue, but also indicates the lack of an adequate decisional framework for pure police power regulation cases. What decisional factors exist are vague or borrowed from Due Process cases. One of the leading students of the inverse condemnation problem is Professor Arvo Van Alstyne. In his 1970 article, "Taking or Damaging By Police Power: The Search For Inverse Condemnation Criteria" *supra*, he examines the cases arising under *Pennsylvania Coal* and concludes that the actual decisions of the courts may be tentatively based upon two main decisional factors: 1) the acceptability of the regulatory objective, and 2) the rational relationship of the enactment to the regulatory objective.

If this is a true general characterization of the hodgepodge of "taking" cases, then the courts have been analyzing police power regulation all along in conformance with the test of *Mugler v. Kansas*, 123 U.S. 623 (1887) *supra*, rather than *Pennsylvania Coal*, acknowledging the latter only in an initial obeisance, or to buttress a result.

D. Pennsylvania Coal Should Be Overruled or Limited to Its Facts

It has been shown above how uneasily the decision in *Pennsylvania Coal* rests on its foundation. To arrive at his holding Holmes ignored a distinguished line of previous Supreme Court cases, as well as several of his own impassioned dissents. There is a strong implication arising from the historical circumstances of the *Pennsylvania Coal* decision that Justice Holmes really did not intend his language to do anything more than achieve an immediate result. As noted above, his entire judicial philosophy was at odds with the basis of his decision. Consistent with this evaluation is the shorthand, cryptic, nature of his invocation of the "Taking Clause". Perhaps all that this famous phrase reflects is an understandable desire on the part of Holmes to avoid use of the substantive due process rhetoric he so detested. (See *e.g., Lochner v. New York, supra*). Using the Fifth Amendment rather than the Fourteenth he neatly avoided a charge of inconsistency with his previous statements on the subject of government regulation.

His own decision in *Block v. Hirsh, supra,* provides a clue that buttresses this interpretation. In upholding a government's police power regulation (a rent control ordinance) he stated:

> "For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort, pressed to a certain height, might amount to a taking *without due process of law.* (emphasis supplied) 256 U.S. 135 at 156

The last phrase involves the Due Process clause of the Fourteenth Amendment, and raises the intriguing question: why was Holmes using the Due Process clause in analyzing a police power regulation involving real property? The only answer that seems to reconcile *Block* with *Pennsylvania Coal* is that Holmes was upholding the regulation in *Block* (as he would in *Lochner* and the others), whereas he was invalidating the regulation in *Pennsylvania Coal* and wanted to avoid the necessity of making a distinction.

Recently the New York Supreme Court has reviewed the cases under *Pennsylvania Coal* and agreed that what is actually being used in land use regulation cases is the Due Process clause of the Fifth and Fourteenth Amendments rather than the Taking clause of the Fifth.

> "Close examination of the cases (following *Pennsylvania Coal*) reveals that in none of them, . . . was there an actual 'taking' . . . Instead, in each the gravamen of the constitutional challenge was that it was an invalid exercise of the police power under the due process clause, and the cases were decided under that rubric." *Fred F. French Investment Co. v. City of New York*, 385 N.Y.S., 2d 5, at 8-10, 350 NE2d 381, appeal dismissed, 429 U.S. 990 (1976).

The explicit overruling of *Pennsylvania Coal* would do no violence to the decisions of this Court that purport to follow it. To the contrary such an action would unify and harmonize the Supreme Court case law that has been decided since. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) provides a good example. In *Goldblatt* the court

quoted the case of *Mugler v. Kansas* (1887) 123 U.S. 623 as follows:

> "The present case must be governed by principles that do not involve the power of eminent domain . . . The (police) power . . . is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses . . ."
> (123 U.S. at 668, 669)

The opinion then went on to list a number of non-real property Due Process cases as controlling precedent. Among them are *Bibb v. Navajo Freight Lines Inc.* (1959) 359 U.S. 520, 529; *U.S. v. Carolene Products Co.* (1937) 304 U.S. 144, 154. The important point is that from *Mugler* to *Bibb* the test of validity of regulation has been whether "laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory . . . *Nebbia v. New York,* 291 U.S. 502 at 537 (1934). The balancing test of *Pennsylvania Coal* cannot be reconciled with these cases.

Some courts have avoided the problem of *Pennsylvania Coal* by simply using the rationale and analysis of Justice Brandeis' dissent. See, *e.g., Just v. Marinette County,* 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

There is also support for the position that *Pennsylvania Coal* if not overruled, could be limited to its specific fact situation and treated as a case where state action operated to impair substantially use of one private property owner's land by authorizing in essence the invasion of it by other private property owners. Many courts have already in effect adopted this view of *Pennsylvania Coal.* See *e.g.,*

McCarthy v. City of Manhattan Beach, 41 Cal.2d 879 (1954); *Marblehead Land Co. v. City of Los Angeles* (9th Cir. 1931) 47 F.2d 528; *Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 C.2d 515, appeal dismissed, 371 U.S. 16 (1962).

It is obvious that something must be done with the taking issue. The state and intermediate federal courts are floundering without any meaningful interpretation of *Pennsylvania Coal* and its doubtful progeny. Municipal administrators nationwide are confused and frequently intimidated by an area of the law that seems to produce absolutely no predictability. Neither side in this issue is favored by the present confused state of the law.

E. A "Taking" in the Pennsylvania Coal Sense Does Not Necessarily Imply "Just Compensation"

There is a third alternative solution to the *Pennsylvania Coal* problem, and that is the one adopted by the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979). In *Agins* the California Supreme Court recognized the concept of a police power regulatory "taking" under *Pennsylvania Coal*, but refused to equate the existence of a "taking" with the necessity for the payment of just compensation. Rather, the Court held that invalidation of the offending regulation is the only judicial remedy available.

There are a number of compelling reasons why this result is consonant with both U.S. Supreme Court precedent and with the compelling social factors of which this Court is ever mindful. First, and most dramatic, is the fact that this result perfectly mirrors the result in *Pennsylvania*

Coal itself. The court in *Pennsylvania Coal* did not order the State of Pennsylvania to pay the fair market value of all coal that would have been lost under the statute in question. The Court simply invalidated the statute and dissolved an injunction based on it.

In direct contradiction to appellant's claim that the precedents of this Court require payment of a monetary award, few, if any, of the Federal cases arising under *Pennsylvania Coal* have actually ordered the payment of just compensation where a land use regulation has been challenged. As the First Circuit Court of Appeals noted in a recent decision:

> "Our research has disclosed no case in which a federal court has ordered a state or local government unit to pay for a diminution of the value of a piece of property caused by a zoning regulation."
> *Pamel Corporation v. Puerto Rico Highway Authority,* 621 F.2d 33 at 35 (1980).

Another compelling factor is that the rule urged by appellant requiring the payment of just compensation wherever a regulation is excessive does not adequately address the unintended nature of the result. Appellant argues that local government always secretly intends the perfidious results of its regulation. However, common sense indicates that the reverse must be true in many cases. It is no secret that many local legislative bodies are made up of persons without the necessary expertise or guile to engage in legislative fraud. Neither is it a secret that many local administrative agencies do not operate with absolute freedom from mistake, bureaucratic rigidity, and lack of adequate direction. Nor should it be forgotten

that the overwhelming majority of local legislative officials are land owners themselves, whose respect for, and allegiance to, traditional notions of American constitutionalism cannot and should not be questioned.

Adoption of Appellant's theory, that payment of monetary compensation is the only remedy available where a police power regulation is found to be excessive, would create a curious anomaly in eminent domain law. Most states permit condemning agencies to abandon direct condemnation at any time up to the point where title may actually be vested in the governmental agency. See *e.g.* Cal. Code of Civ. Prod. § 1268.510. The theory upon which the statute is based is that condemning agencies, who are often subject to fiscal constraints and shifting legislative priorities, should have the freedom to restore the *status quo ante* and avoid payment of just compensation.

The invalidation rule of *Agins, supra,* would permit essentially this same result. The rule urged by appellant herein would give property owners in inverse condemnation actions greater rights than property owners in direct condemnation actions.

II

THE PRAGMATIC AND POLICY RAMIFICATIONS OF THIS CASE ARE OF OVERWHELMING IMPORTANCE

The cities and municipal associations joined as amici herein will be directly and fundamentally affected by the decision in this case. As municipalities they have been delegated basic land use regulatory power. The provision

of urban services to land is the very *raison d'etre* for the existence of a city.

As demand for increasingly sophisticated and expensive public services has grown, so has the necessity for a concommitantly broad land use regulatory authority. Because of the possibility that the outcome in this case could result in the affixing of a price tag, uncontrolled by the municipalities, on the exercise of this broad regulatory authority, it is important to examine the potential impact of the development of an inverse condemnation compensation remedy on municipal activities.

A. Modern Regulation More Often Involves the Timing and Direction of Development Than Long Term Prohibition of Use

Many inverse condemnation cases, and potential condemnation cases, involve so-called "fringe lands" that are limited to non-urban uses by a comprehensive land use plan. Often these lands were purchased by persons with "investment backed expectations" of immediate development. Those lands that cannot be immediately developed pursuant to a City's growth management plan are placed in so-called "holding zones" where they must await the arrival of orderly urban growth. Although this often results in dramatic reduction in potential value of land, it is the very foundation of modern land use management and the only practical way to avoid uncontrolled urban sprawl.

Urban sprawl is perhaps the greatest single problem confronting American society today. Certainly it is the pre-

dominant feature of many portions of the contemporary landscape. The U.S. Congress is presently engaged in the process of assessing the threat posed by urban sprawl, and proposing legislative remedies. See *e.g.*, "Compact Cities: Energy Saving Strategies for the '80's," (Report of the Sub-committee on the City of the Committee on Banking, Finance and Urban Affairs, House of Representatives, July 1980). Similarily State legislatures are involved in the effort to ameliorate and, if possible, correct the worst consequences of this phenomenon. (See *e.g. An Urban Strategy for California* (Feb. 1978), Cal. Office of Planning and Research.).

The economic pressures leading to urban sprawl are great. Real estate developers are not unaware that a market exists for suburban housing. They also recognize that the further one travels into the countryside, the cheaper is the price of raw land. These twin factors— high demand and cheap fringe land—have created the crazy quilt pattern of urbanization so characteristic of many parts of the country.

One can argue that this pattern represents the failure of modern planning. In a sense, that is true. Yet the charge can only be assessed in light of the constraints placed on urban planners within the time period during which it occurred. It should not be forgotten (indeed it is important to an understanding of the present case) that the significant "land use wars" of the past twenty years have been fought over the validity of comprehensive growth management plans. For years, the issue of timing controls was fought bitterly in state courts all over the country. See

e.g. Golden v. Planning Board of Town of Ramapo, 30 N.Y. 2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972); *Associated Home Builders, etc. Inc. v. City of Livermore,* 18 C.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473 (1976); *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court,* 13 C.3d 225, 118 Cal.Rptr. 158, 529 P.2d 582 (1974); *Deutsch,* "Land Use Growth Controls: A Case Study of San Jose and Livermore, California" (1974), 15 Santa Clara Lawyer 1. Without the practical ability to control, either singly or in concert with other agencies, the timing of development on the fringes of urbanization, the effectiveness of growth management ceases to exist.

For twenty years there was great uncertainty in the law, and thus in the minds of planners and local legislators, about the inherent authority of cities to engage in growth management and timing control. Now, after definitive judicial decisions in favor of such local authority have been rendered, there has been a sudden shift in tactics by unhappy landowners and the inverse condemnation action has entered into its heyday.

It is clear to anyone who has been trapped in a suburban traffic jam at commute time or has read newspaper accounts of the growing dependence of the United States on the most strategic raw material of modern industrial society, oil, that the consequences of urban sprawl are greater than merely the professional discomfiture of the local planner.

The consequences are both local and national in scope. "Leap frog" developments consume vast amounts of local capital for roads, bridges, gas, water and sewer lines,

libraries, clinics, hospitals, and public safety services. In many cases, it is impossible to plan for the most efficient alignment and installation of such facilities or the provision of services simply because many or most of the parts of the puzzle are lacking. The per customer cost of providing underutilized suburban infrastructure is enormous See, *e.g. "Compact Cities" supra,* at 14.

Subregional and regional impacts are even more dramatic. It has been estimated that transportation use alone consumes 60% of the petroleum used in the United States. It is estimated that 900 billion passenger miles are driven daily in urban areas by autos occupied by only 1.6 persons. "Urban Transportation and Energy: Potential Saving of Different Modes", Congressional Budget Office, Washington, D.C., December, 1977.

Another disturbing national consequence of uncontrolled urban sprawl is the destruction of prime agricultural land. It has come, perhaps as a rude shock to a nation accustomed to being characterized as the proverbial cornucopia, that there are limits to the potential productivity of its farm land. The General Accounting Office in 1979 concluded that an estimated 3 to 5 million acres per year of farm land are being converted to non-farm use. "Preserving America's Farm Land—A Goal The Federal Government Should Support", General Accounting Office, Washington, D.C. 1979. This process is both accelerated, and aggravated, by the effects of "leap frog" development. Parcels of agricultural land that are not converted become isolated and thus unsuited for agricultural operations because of proximity to urban development. This destructive process

is exacerbated by the historical fact that many cities originated as support and processing centers for highly productive agricultural areas. Uncontrolled urban sprawl can thus destroy at the same time both fertile land and the very reason for a city's original existence.

The consequences detailed above involve both direct and indirect costs to the municipalities forced to carry out their functions in a setting of urban sprawl. However, these costs are overshadowed by the dramatic negative potential of adverse judgments in inverse condemnation actions. It is unfortunate that both inflation and the "taxpayer's revolt" have resulted in municipal budgets less capable of absorbing fiscal blows than ever before in recent history. As more social demands are being placed on cities by the pressing needs of society, greater flexibility is required. That flexibility would only be decreased by acceptance of the theory of appellant herein.

III

REGULATION OF GROWTH IS PROPERLY HOUSED IN THE LEGISLATIVE FORUM, NOT THE JUDICIAL FORUM

Legislative bodies are uniquely equipped to make land-use decisions under our form of government. They are the composite mind of the body politic. Recognition that there may be flaws in that system does not dictate that it should be supplanted by the courts. Cities are, in modern society, the most appropriately equipped political bodies to deal with the needs and desires of the individual citizens that populate them. City government represents the heartbeat of community attitude and belief. Ever since *Euclid v. Am-*

bler Realty Co., 272 U.S. 365, 71 L.Ed. 303 (1926), local agencies have practiced and experimented with meeting the changing needs of society and its citizens.

The courts have always stood as a check on the exercise of land regulation, but they have never been equipped with the expertise necessary to reconcile the social and economic goals that often conflict in complicated land-use decisions. Rather, courts, because of their transitory involvement, are inclined to consider only a piece of the legislative quilt, not fully recognizing that the whole is made up of the individual pieces. This is not to suggest that courts should analyze the whole. However, it does suggest that the traditional rule of judicial deference to legislative determinators should be maintained in the complicated and sensitive area of land use.

> "California is attempting to grapple with difficult land use problems through new policies and new mechanisms of regulation. The state is also struggling with the problem facing cities and counties in those cases where their zoning efforts to preserve open space in response to the state's announced policy . . . may unwittingly have resulted in seizure of property rights that they did not intend and cannot afford. Federal Courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems."
>
> *Sederquist v. City of Tiburon,* 590 F.2d 278, at 281 (9th Cir. 1978). Quoting *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092, at 1095 (9th Cir. 1976).

The judicial procedure demanded by appellant pays little or no attention to the financial ability of a city to fund the

forced purchase, nor does it ascertain whether the city really wants or needs to add to its land inventory. Preferably, a city when found to have regulated excessively should be able to make a choice between rescinding the regulation or buying the property.

Amici admit that in the circumstances of today's crowded and complex world that it is often necessary for a city to adopt land control regulations that may frustrate the land use plans of private property owners. Yet land investment in many ways is no different than investing in the stock market where fortunes may be made and lost in a day. One certainly would not expect to hear appellant (a large publicly held corporation) suggest that it has to "justly compensate" all of its stockholders if the market has a severe downturn. Yet appellant demands in the public arena a greater stability of expectation than it can achieve in the private marketplace.

Appellant places great emphasis on the fact it *thought* it could build out the property as a power plant. Appellant is undoubtedly placing reliance on this Court's pronouncement in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) that "distinct investment backed expectations" may be so seriously interfered with as to constitute a taking. However this Court in the very same case, has stressed that something beyond belief in a favorable outcome is required where a property owner speculates in undeveloped land. That assertion also runs contrary to this court's opinion in *Penn Central* wherein it was noted that:

> . . . the submission that appellants may establish a 'taking' simply by showing that they have been denied

> the ability to exploit a property interest that they heretofore *had believed* was available for development is quite simply untenable." *Penn Central Transportation Co. v. New York City, supra* at 130. (emphasis added)

Appellant suggests that government regulation is driving the price of land out of the reach of the very citizens that are supposedly protected by the regulation. *Amici* suggest that appellant confuses the financial impact of regulation with the impact on the marketplace of that type of speculative investment that appellant argues should be protected from regulation. If expectations of economic profit are important to the investor, so are expectations of a decent and secure future important to the citizens that carry on their daily lives in our cities. As this Court has emphatically stated, citizens have the right to live in pleasant surroundings where communities are "beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled." *Berman v. Parker,* 348 U.S. 26, at 32-33, 99 L.Ed. 27 (1954). [See also *Village of Belle Terre v. Boraas,* 416 U.S. 1, 39 L.Ed.2d 797 (1974)].

Amici are also concerned about the "chilling effect" that could easily result if inverse condemnation becomes a readily available remedy. The legislative bodies of by far the majority of cities and towns in this country are composed of citizens who contribute their time for little or no money. These local governments are anything but professional. Rather, they tend to reflect a cross section of the communities they represent.

The National Association of Manufacturers, *amicus* for Appellant, ridicules this proposition. Amicus Brief, Pages 16-17. The Association attempts to paint a picture of "big government" oppressing the "little man". However, in fact, the "little man" is often a giant corporation with economic resources that dwarf the municipality it confronts. A case in point that was recently decided in the U.S. District Ct. for the Northern District of California is *Oceanic California Inc. v. City of San Jose,* Civil No. C-78-2622-AJZ, (Motion to dismiss granted August 21, 1980). In that case, the City of San Jose was ranged against a subsidiary of Castle and Cooke, Inc. While admittedly San Jose, as the fourth largest city in California, is hardly a village, the annual revenues of Castle & Cooke exceed those of San Jose by approximately a factor of four. San Diego Gas & Electric, appellant herein, occupies a similar position vis-à-vis the Appellant City of San Diego.

IV

AN INVERSE REMEDY WILL UNREASONABLY IMPACT JUDICIAL ADMINISTRATION

The very existence of a pot of money at the end of litigation encourages land-use litigation. The City of San Jose has expended over $200,000 in attorneys' fees alone in the past two years just to defend two cases alleging inverse condemnation brought in Federal District Court. *Barbaccia v. County of Santa Clara, et al.,* Civil No. C-7601182 S.W., N.D. Cal. (Judgment entered in favor of defendant June, 1980). *Oceanic, supra.* An enormous amount of Federal District time has also been expended.

The judicial mechanism used to evaluate the monetary impact of land use regulation is cumbersome and expensive. Direct condemnation cases themselves are notoriously lengthy, complicated and difficult to try to a jury. Where the natural arguments over value are coupled with the elusive quality of the police power taking issue, the resulting litigation cannot be characterized as "routine". A judge sitting in such a case will have to exert extraordinary care and vigilance to keep a jury from indulging a punitive impulse when assessing the market value of land taken.

V

THE UNRESOLVED "SINGLE PARCEL" ISSUE

The record in this case indicates that the trial court considered only a portion of appellant's entire parcel of property and found a "taking" as to only that portion. The entire parcel comprised some 412 acres. Appellant's Brief Page 5. The trial court apparently decided in the 200+ acres which fell within the general plan designation of open space was to be considered by itself for purposes of the "taking" analysis. The question that naturally arises is: what happened to the remainder?

Apparently there was a use for the remainder which was valuable. The trial court ignored this portion and, in the opinion of *amici*, improperly ruled that Appellant's property had no remaining value. Unfortunately, the record is vague on this point. However, the impact of the trial court's silent subdivision of the property is substantial if approved by this Court.

Such a result runs afoul of the clear line of cases decided in the United States Supreme Court. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 8 L.Ed.2d 130 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L.Ed. 348 (1915).

> " 'Taking' jurisprudence *does not divide a single parcel* into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central Transportation Co. v. New York City, supra,* at 130. (emphasis added)

Although this issue was not argued in the court below, its existence in the factual context of this case raises a serious question as to the propriety of this appeal. The cases cited above clearly establish the rule that the property owner may not segregate his property interests for the self-serving purposes of inverse condemnation litigation. Amici respectfully urge this Court to seek clarification of this potentially crucial issue before ruling on the instant appeal.

CONCLUSION

Oliver Wendell Holmes, dissenting in *Lochner v. New York, supra,* stated: "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion . . . ." *Amici* feel that the same can surely be said of any dogmatic interpretation of a constitutional provision. The dominant opinion of the people of this country, as expressed by their legislators and laws, seeks a redress of a perilous im-

balance between unrestricted growth and the fundamental needs of society.

For all the reasons set forth *Amici* respectfully urge this Court to affirm the decision of the court below.

Respectfully submitted,

ROBERT J. LOGAN
CITY ATTORNEY
COUNSEL OF RECORD
GARY B. REINERS
SR. ASSISTANT CITY ATTORNEY
Attorneys for Amicus Curiae

(Appendices follow)

Appendix "A"

NATIONAL LEAGUE OF CITIES AND CALIFORNIA CITIES JOINING IN THIS BRIEF

NATIONAL LEAGUE OF CITIES

Alan Beals, Executive Director

Ross Davis

Davis & Simpich

910 - 16th St., N.W.

Washington, D.C. 20006

PARTICIPATING CALIFORNIA CITIES

Alameda
Carter J. Stroud
City Hall
Alameda, CA 94501

Burlingame
Jerome F. Coleman
City Hall
501 Primrose Road
Burlingame, CA 94010

Carmel-by-the-Sea
George W. Brehmer
P. O. Box 221130
Carmel, CA 93922

Commerce
William Camil
P. O. Box 8743
San Marino, CA 91108

Concord
David J. Levy
Concord Civic Center
Concord, CA 94519

Del Mar
D. Dwight Worden
1050 Camino Del Mar
Del Mar, CA 92014

Duarte
William Camil
P. O. Box 8743
San Marino, CA 91108

Garden Grove
Eric Lauterer
11391 Acacia Parkway
Garden Grove, CA 92640

Hayward
John W. Scanlon
22300 Foothill Blvd.
Hayward, CA 94541

Larkspur
Joseph A. Forest
P. O. Box 585
Larkspur, CA 94939

Los Angeles
Burt Pines
Room 1800
200 North Main St.
Los Angeles, CA 90012

Modesto
Elwyn L. Johnson
P. O. Box 642
Modesto, CA 95353

Novato
Joseph A. Forest
901 Sherman Avenue
Novato, CA 94947

Palmdale
James S. Kostas
708 E. Palmdale Blvd.
Palmdale, CA 93550

Palm Springs
William J. Adams
P. O. Box 1786
Palm Springs, CA 92262

Petaluma
P. Lawrence Klose
P. O. Box 61
Petaluma, CA 94952

Portola Valley, Town of
James T. Morton
Wilson, Morton, Assaf & McElligott
P. O. Box 152
San Mateo, CA 94401

Sacramento
James P. Jackson
812 Tenth Street, Suite 201
Sacramento, CA 95814

San Jacinto
Donald C. Wickham
Wickham & Bloom
133 N. Buena Vista, Suite 3
Hemet, CA 92343

Santa Clara
Edwin J. Moore
City Hall
1500 Warburton Avenue
Santa Clara, CA 95050

Santa Fe Springs
William Camil
P. O. Box 8743
San Marino, CA 91108

Stockton
Gerald A. Sperry
City Hall
Stockton, CA 95202

Tiburon
Robert I. Conn
1534 Fifth Avenue
San Rafael, CA 94901

Walnut Creek
Daniel J. Curtin, Jr.
City Hall
Walnut Creek, CA 94596

Appendix "B"

Although Rule 42 permits submission of this *amicus* brief of City of San Jose by its authorized law officer, City Attorney Robert J. Logan, without the written consents of the parties, *amicus* City has solicited and obtained consents from the parties nonetheless, so as to assure compliance and advise the parties of City's interest. Those consents are included in Appendix B to this brief.

Office of
City Attorney
City of San Jose [Letterhead]

Robert J. Logan
City Attorney

September 2, 1980

Louis E. Goebel, Esq.
Luce, Forward, Hamilton & Scripps
1700 Bank of California Plaza
San Diego, CA 92101

Re: San Diego Gas & Electric Co. v.
City of San Diego, et al,
United States Supreme Court
No. 79-678

Dear Mr. Goebel:

The City of San Jose desires to file a brief amicus curiae in the above captioned case now pending before the United States Supreme Court. Although Rule 42 permits submission of this amicus brief of the City by its authorized law officer without consent of the parties, the City of San Jose solicits, on its behalf and on behalf of other cities who will be joining in this brief, your consent for its filing.

Sincerely yours,
/s/ Robert J. Logan
Robert J. Logan
City Attorney

RJL:lb

On behalf of the attorneys for the Appellant, San Diego, Gas & Electric Company, I hereby give such consent.

/s/ L. E. Goebel
Louis E. Goebel

Office of
City Attorney
City of San Jose [Letterhead]

Robert J. Logan
City Attorney

September 2, 1980

C. Alan Sumption, Esq.
Deputy City Attorney
City Administration Bldg.
202 C Street
San Diego, California 92101

Re: San Diego Gas & Electric Co. v.
City of San Diego, et al,
United States Supreme Court No. 79-678

Dear Mr. Sumption:

The City of San Jose desires to file a brief amicus curiae in the above captioned case now pending before the United States Supreme Court. Although Rule 42 permits submission of this amicus brief of the City by its authorized law officer without consent of the parties, the City of San Jose solicits, on its behalf and on behalf of other cities who will be joining in this brief, your consent for its filing.

Sincerely yours,
/s/ ROBERT J. LOGAN
Robert J. Logan, City Attorney

RJL:lb

On behalf of the attorney for the Appellee, City of San Diego, I hereby give such consent.

John W. Witt, City Attorney
By /s/ C. ALAN SUMPTION
C. Alan Sumption
Deputy City Attorney

FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-678

In the Supreme Court of the United States

OCTOBER TERM, 1980

SAN DIEGO GAS AND ELECTRIC COMPANY, APPELLANT

v.

CITY OF SAN DIEGO, ET AL.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

J. VANCE HUGHES
ANN P. GAILIS
RICHARD J. LAZARUS
E. ROBERT WRIGHT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

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v.

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ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether a municipality's planning and zoning actions constitute a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments where they are rationally related to a legitimate governmental purpose and do not have an unreasonably harsh economic impact or where they prevent a landowner from making a harmful use of his land.

2. Whether the Fifth and Fourteenth Amendments require that a state court afford a remedy in damages for a land-use regulation held to be an unconstitutional taking of property where the remedies of declaratory relief and mandamus are available.

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INTEREST OF THE UNITED STATES

This case concerns the validity of a city's general planning activities aimed at ensuring orderly growth and development in an entire community, including a delicate coastal floodplain. The city's actions are alleged to constitute a taking under the Fifth and Fourteenth Amendments, and appellant seeks to compel the payment of damages in what it styles an action for inverse condemnation.

In numerous federal environmental programs Congress has encouraged state and local governments to engage in land-use planning and to enact land-use regulations aimed at promoting public health, safety, and welfare by preventing the degradation of local natural resources. See, *e.g.*, Clean Water Act, 33 U.S.C. (Supp. II) 1251(b), 1251(g). In particular, several federal statutes now require or strongly encourage state and local restrictions on development in floodplain, wetland, and tidal areas. See, *e.g.*, the National Flood Insurance Program, 42 U.S.C. 4102 (comprising the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973); the Coastal Zone Management Act of 1972, 16 U.S.C. 1451(b), (d), 1452(a). A decision by the Court that the planning and regulatory activities at issue in this case are unconstitutional might call into question features of such federal or federally-assisted programs and thwart the implementation of important national policies. And a ruling that the Constitution requires that a remedy in inverse condemnation be made available to any plaintiff who proves that land-use planning activities have effected an unconstitutional taking of his property would threaten federal policies by inhibiting even constitutionally permissible land-use regulation at all levels of government through the threat of financial liability of large, though uncertain dimensions.

STATEMENT

1. Appellant San Diego Gas & Electric Company owns 412 acres of land in the Sorrento Valley approximately 19 miles north of San Diego, California (A. 36; Tr. 927).[1] Appellant ac-

[1] "A." refers to the joint appendix to the briefs filed in this Court. "J.S. App." refers to the appendix to the jurisdictional statement. There are two transcripts in the present case. The first is the transcript of court proceedings ("Tr."); the second is a compilation of pleadings entitled "Clerk's Transcript"

quired the property in 1966 as the possible site for a nuclear power plant which was projected for construction in the 1980's (A. 36; Tr. 256, 738). Slightly more than half of the 412 acres lie in an estuary known as the Los Penasquitos Lagoon (see Tr. 846, 891, 908; Ex. 43 at 2).[2] The trial court found that this estuary portion of the property (some 214 acres) was taken by the City of San Diego and that approximately 15 additional acres were damaged by the severance (Tr. 421, 682–684; A. 46).[3]

The 214-acre parcel is flat and at a low elevation (two and one-half to six feet) (A. 64; Tr. 925). One-third of the property is subject to tidal action (A. 36–37; Tr. 139–140, 669–670, 728–729); and the entire 214-acre parcel serves as a drainage basin and stilling pond for three river systems which drain thousands of acres in nearby canyons and valleys and flow into the lagoon (see A. 37, 64; Tr. 134, 311, 545, 726, 938; Ex. 43 at 2). None of the land is dry enough to till (Tr. 112). It is subject to flooding (A. 113, 123), lying within a 100-year floodplain (Tr. 312–313,

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compiled by the Clerk of the San Diego County Superior Court ("C. Tr."). References to numbered exhibits ("Ex.") are to plaintiff's (appellant's) trial exhibits.

[2] An estuary is a semi-enclosed coastal body of water which has a free connection with the open sea. Estuaries are strongly affected by tidal action and the mixing of seawater with freshwater from land drainage. Council on Environmental Quality, *Our Nation's Wetlands* 59 (1978).

[3] In the trial on damages, the parties stipulated (Tr. 682–689) that the area deemed to be acquired pursuant to the trial judge's decision on liability amounted to just under 214 acres. Two additional sections, totalling approximately 15 acres (excluding a small leased portion) were treated as remainder parcels for which severance damages were sought (Tr. 684, 721–722). The total of approximately 229 acres (which excluded a 12-acre section in the southwest corner of appellant's property and more than 170 acres to the north and east, part of which was leased to a nursery business and part of which featured residential development) was the apparent source of the 228-acre figure used by the Court of Appeal (A. 65 n.1). That court's figures on zoning classifications (*ibid.*) appear to be in error, however, since in 1973 part of the property was rezoned A-1-10, as well as A-1-1 (see A. 39). It is unclear what the trial judge believed to be the total area of the subject property, and we are advised by the City's attorney that the judge was in error as to the acreage zoned A-1-1 after the 1973 rezoning.

For simplicity's sake we will use the stipulated 214- and 229- acre figures for the property at issue and, in describing zoning changes, will use the figures cited in the trial judge's findings (A. 37, 39).

We note that the parcels described in the complaint (A. 16–20) amount to a considerably smaller acreage than was found to have been taken, and we have found no amendment to the complaint in the record that would explain this discrepancy.

953) and perhaps a 50-year floodplain (Tr. 133, 575).[4] Ninety percent of the land is within the California Coastal Act zone (A. 49; Tr. 931). The property is vacant and unimproved except for sewer and utility lines (Tr. 926–927).

When appellant acquired the 412-acre parcel in 1966, the 229-acre subject property lay in three zoning classifications: approximately 116 acres were zoned for light industrial use (M–1–A) (A. 37); a few acres were zoned residential with a five-acre minimum lot size (R–1–5) (Tr. 24, 839, 926); and the eastern half was in an agricultural "holding" category (A–1–1), which permitted, *inter alia*, residential development on a minimum lot size of one acre (A. 37).[5] The City's general plan designated the property for future industrial growth (Tr. 12, 23, 263).

In 1972 the City actively commenced to plan for future open space (A. 38). In the Spring of 1973 the City's Departments of Planning and of Community Development issued reports on the subject and the Planning Commission and the City Council discussed the matter in a series of meetings (A. 38–40). On June 7, 1973, the San Diego City Council rezoned portions of appellant's property (A. 40); of the 229 acres at issue, 112 were zoned for agricultural uses with a minimum density of one dwelling-unit per ten acres (A–1–10); nearly 77 acres remained in an industrial category (M–1–A); and nearly 50 acres remained in an agricultural holding category (A–1–1), with a recommendation that they be considered for possible industrial use upon the submission of specific development plans (Ordinance No. 11088, J.S. App. K–12; A. 39).

On June 19, 1973, the City Council adopted a proposed open space element for the City's general plan (A. 41). That element

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[4] Floodplains are the lowland and relatively flat areas adjoining inland and coastal waters, and other areas subject to flooding. U.S. Water Resources Council, *A Unified National Program for Floodplain Management* III–3 (1979). The 100- and 50-year floodplain standards mean that the chance of a flood is one or two percent respectively in any given year. See 44 C.F.R. 59.1.

[5] The "A–1–1" classification is a general "holding" category used for undeveloped lands. In addition to residential and agricultural uses, land within this classification may be used for stables, churches, public utility substations, poultry processing, and other similar activities. San Diego Municipal Code § 101.0404 (enacted by Ordinance No. 8706 N.S., adopted Aug. 16, 1962). And conditional use permits may also be granted for service stations, boarding kennels, educational institutions, and private recreation areas, golf courses, driving ranges, and research facilities (Tr. 384–385).

designated substantially all of the subject property as open space[6] but stated that a nuclear power plant, "if sensitively designed and sited," could be compatible with open space (A. 41; Ex. 11 at 24). The plan also stated that considerations of public safety "would focus upon those uses of open space designed to preclude potentially harmful developments" (Ex. 11 at 4). The Deputy City Attorney advised the Council on that date that the open space designation would not "freeze" the property; rather, permit applications would have to be considered in light of the zoning on the property (Tr. 343).

During this planning process, the City listed the estuary portion of the property for future purchase but did not attempt actually to acquire it (A. 38–41). After voters rejected a bond issue in September 1973 to secure funds for open space acquisition, the City deleted the property from its priority list of lands to be acquired (A. 41; Tr. 244–245; see Ex. 25 at 1). Appellant abandoned plans to construct a nuclear facility after various factors, including an off-shore fault, showed such a project not to be feasible (Tr. 47, 73). Appellant has made no efforts to develop the land; it has neither applied for permits or clearances (A. 114) nor solicited offers to purchase the property (A. 83).

2. On August 15, 1974, appellant filed suit against the City of San Diego alleging that it had engaged in activities designed to take appellant's land for public use without compensation or to reduce its value for future acquisition.[7] These activities included the adoption of the open space element of the general plan, the down-zoning of the property and the City's abandoned proposal to acquire the property. On April 9, 1976, the trial judge ruled that appellant had been deprived of all practical use of 214 acres

[6] "Open space" was defined as "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes" (Ex. 11 at 2).

[7] The complaint sets forth three causes of action: in the first, appellant sought inverse condemnation damages in excess of six million dollars; in the second and third, it sought injunctive relief setting aside the rezoning and the open space designation. In an amended complaint appellant added a fourth cause of action seeking a declaration that the ordinances that rezoned the property and adopted the open space element of the general plan were invalid as arbitrary and unreasonable exercises of the police power (C. Tr. 38–39). The trial court sustained the City's demurrer to the second and third counts, ruling that mandamus was "not the proper remedy to challenge the validity of a legislative act" (C. Tr. 42).

designated as open space. The court found that no development would be allowed unless it was consistent with the open space requirement in the general plan (J.S. App. A–7 to A–8), and concluded that it would have been futile, therefore, for appellant to seek development permission. The court ruled that appellant was entitled to damages for a taking from June 19, 1973, the date that the open space element of the general plan was adopted (A. 42–43; Tr. 421).

On the issue of damages, appellant presented testimony to a jury that the highest and best use of the land would be for development as an industrial park (Tr. 645). Specifically, its witnesses testified that up to 150 acres could be developed (Tr. 711), if four feet of fill (a total of 1.225 million cubic yards) was placed on a substantial portion of the property (Tr. 566, 905). However, the tidal portions of the property were conceded to be unsuitable for development and best disposed of by donation to the State (Tr. 669–670, 742). On May 20, 1976, the jury awarded appellant over $2.8 million in damages for the 214-acre parcel and nearly $290,000 in severance damages for the remainder parcels (A. 46).

3. The City appealed to the California Fourth District Court of Appeal, which upheld the judgment (A. 48–61). The California Supreme Court then granted the City's petition for a hearing (J.S. App. D), but later retransferred the case (J.S. App. E) without hearing to the court of appeal for reconsideration in light of the state supreme court's ruling in *Agins* v. *City of Tiburon*, 24 Cal.3d 266 (1979) (J.S. App. F), affirmed by this Court in No. 79–602 (June 10, 1980).

On reconsideration, the court of appeal reversed its earlier judgment. The court noted (A. 64–66) that the property is "at low elevation, is a drainage basin, tidal basin or flood plain and is subject to standing water" and is partly subject to "ocean tidal action." The court also noted that appellant had not made an application to use or improve the property or to ask the City what development might be permitted. The opinion further stated that even assuming no use was acceptable to the City, the remedy would be mandamus or declaratory relief, not inverse condemnation. But the court noted that on the present record, whether the City had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element or by applying the zoning and general plan unconstitutionally were "disputed fact issues not covered by the trial court in its findings and conclusions" (A. 66). The appellate

court reversed the trial court's judgment and stated that appellant could elect to retry the case to reach a resolution of the disputed fact issues. The California Supreme Court denied appellant's petition for a hearing (J.S. App. I).

SUMMARY OF ARGUMENT

I

1. In determining whether government regulation of the uses of property is invalid as an uncompensated taking within the meaning of the Fifth and Fourteenth Amendments, the governing precedents require consideration of a number of factors that fall into two basic categories: the character of the government action and its economic impact on the property owner. This Court has never found a taking where, as in this case, the government action took the form of a "public program adjusting the benefits and burdens of economic life to promote the common good" (*Penn Central Transportation Co* v. *New York City*, 438 U.S. 104, 124 (1978)) and the property owner's reasonable expectations respecting beneficial uses of the property were not thwarted. Even substantial diminutions in the value of the property will not ordinarily constitute a sufficiently harsh impact to warrant striking down the regulation as a taking.

In the present case, appellant challenges three categories of governmental actions as takings: (1) the 1973 rezoning of the subject property; (2) the City's proposal at one point to acquire part of the property and its later abandonment of the proposal; and (3) the identification of part of appellant's property as coming within the "open space" element of the City's general plan. The first two challenges do not warrant serious consideration. Following the rezoning, 77 acres were zoned for industrial use and nearly fifty more were placed in a category that appellant's witnesses testified made it likely that they too would be available for industrial development. This left appellant with more property available for such use than it possessed before the rezoning. As to the second challenged action, the trial court did not find that the proposed, and later abandoned, acquisition plans were formulated in bad faith, and its findings concerning the date on which the property allegedly became valueless make the acquisition proposals irrelevant to the court's conclusion that the City effected a taking of the property.

The trial court found that because of the City's designation of appellant's property as open space, it would have been futile for

appellant to apply for a permit to develop its land in accordance with the industrial use zoning; but that finding was effectively vacated when the court of appeal reversed the judgment, and that disputed issue is yet to be resolved. Because it is thus unknown what type and size of industrial development, if any, the City might have permitted upon the submission of a specific development plan, the record does not establish that the City deprived appellant of all beneficial uses of its property. Accordingly, the application of the open space plan to appellant's property was not shown to be a taking.

Even assuming that the City would have denied appellant permission to use its property for industrial development, a taking is not established because the property was not rendered valueless and appellant's reasonable expectations concerning beneficial uses were not thwarted by the City's actions.

2. Appellant's property lies in an estuary and a floodplain, and the record suggests that development on the scale proposed by appellant, which would require filling the surface of some 150 acres with more than a million cubic yards of dirt, would be likely to injure the surrounding lands and waters and aggravate the severity of floods. Decisions of this Court beginning with *Mugler* v. *Kansas*, 123 U.S. 623 (1887), support the proposition that a government may prohibit harmful uses of property—those that constitute a public nuisance or that otherwise endanger public health and safety—without triggering the Takings Clause, even where the prohibited use is the only profitable use. Such prohibitions are, of course, invalid under the Due Process Clause if they do not bear a rational relation to a legitimate governmental purpose, *e.g.*, if they are *unnecessarily* harsh.

Appellant did not in this case establish that the asserted highest and best use of its land would not amount to the equivalent of a nuisance that the City could constitutionally prohibit even if noninjurious uses would not be financially rewarding. Accordingly, appellant did not establish that the application of the City's open space plan to the property at issue here constituted a taking.

II

Appellant contends that when a state court determines that a regulation of land use has so exceeded the limits of the police power as to amount to an unconstitutional taking of property,

the court is not free to limit the plaintiff to declaratory relief and mandamus, but must afford a damages remedy on a theory of inverse condemnation. Its position rests on several flawed arguments.

First, appellant incorrectly argues that whenever a measure regulating the uses of property is deemed to constitute a taking, the Fifth Amendment mandates a compensation remedy, *i.e.*, enforced purchase of the property by the enacting governmental body. That proposition is unsupported by precedent. Decisions of this Court on which appellant relies suggest a sensitivity to legislative choice in considering what remedies to give when a statute is found to be invalid under the Takings Clause. A legislature that enacts a measure regulating land use has chosen to define property rights rather than to acquire them. If in the present case, contrary to our submission, the City has misjudged the degree to which it may validly regulate the property at issue, it should not be found to have impliedly agreed to purchase it.

Second, appellant incorrectly suggests that the injunctive remedies made available in the California courts are inadequate as a matter of constitutional law. The record does not bear out that claim. If the measures at issue were struck down, the restrictions that appellant alleges deprive it of all beneficial use of its property would be lifted; and mandamus would be available to compel the issuance of permits and the like to assure compliance with the invalidation order. Even in cases brought in federal court against federal officials, this Court has not suggested that a damages remedy is the sole adequate remedy for constitutional violations, and principles of federalism dictate greater caution in determining that damages are the only adequate remedy for violations like the one alleged here, which are established in state court suits against state or local governments.

Finally, appellant erroneously ignores the impact that its compelled-purchase remedy would have on efforts to develop sound land-use policies, an area traditionally committed to state and local governments. Compelled purchase of property not only restricts a government's options in land-use planning; it may, given the substantial size of judgments in so-called inverse condemnation cases, create budgetary problems that constrain decisions in other areas. And the mere threat of such a remedy may inhibit local governments from devising constitutional land-use policies, for fear that a court may disagree with corpo-

ration counsel on their constitutional validity. Such inhibitions may also discourage the participation of state and local governments in federal environmental programs that depend on implementation through land-use controls at the state and local level.

ARGUMENT

I. A MUNICIPALITY'S PLANNING AND ZONING ACTIONS DO NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS WHERE THEY ARE RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL PURPOSE AND DO NOT HAVE AN UNREASONABLY HARSH ECONOMIC IMPACT OR WHERE THEY PREVENT A LANDOWNER FROM MAKING A HARMFUL USE OF HIS LAND

A. Municipal Land-Use Planning Measures that Are Rationally Related to a Legitimate Governmental Purpose and Do Not Have an Unreasonably Harsh Economic Impact on the Land Owner Do Not Constitute Takings

1. *Applicable principles*

In determining whether land-use regulations as applied to a particular section of land effect a taking of property within the meaning of the Fifth and Fourteenth Amendments, this Court has looked to a number of factors that fall within two general categories: "the character of the governmental action" and "[t]he economic impact of the regulation." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). See also *Agins* v. *City of Tiburon*, No. 79–602 (June 10, 1980).[8]

The first factor, the character of the governmental action, is assessed by looking at the nature of the interference with the property. Where an interference "can be characterized as a physical invasion by government" (*Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124, citing *United States* v. *Causby*, 328 U.S. 256 (1946)), or as an acquisition of assets by the government acting in its entrepreneurial capacity, it is more vulnerable to constitutional attack. 438 U.S. at 124, 128, 135. On the other hand, a taking should rarely be found where the interference arises "from some public program

[8] As explained below (pages 12–14, *infra*), there is some doubt whether this case is properly characterized as one testing the actual application of land-use regulations.

adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124.

The second factor—the impact of the restriction on the property—necessarily requires consideration of the "bundle of rights" that is property: "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus* v. *Allard*, 444 U.S. 51, 65–66 (1979).[9] It is clear that mere diminution in the value of property does not effect a taking (*Penn Central*, *supra*, 438 U.S. at 131; see also *Hadacheck* v. *Sebastian*, 239 U.S. 394, 408 (1915)). Moreover, in assessing the acceptability of the burden imposed on an owner by government regulation, it is essential to consider as well any benefits that accrue to him as a result of the application of such regulation to the property of others. *Agins* v. *City of Tiburon*, *supra*, slip op. 6. See also *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 147 (Rehnquist, J., dissenting).

These two interdependent sets of criteria do not amount to a rigid formula for resolving all takings claims. The fundamental question raised by such claims is one of "'justice and fairness.'" 438 U.S. at 124. That is a question that "necessarily requires a weighing of private and public interests" (*Agins* v. *City of Tiburon*, *supra*, slip op. 4–5) and "ultimately calls as much for the exercise of judgment as for the application of logic." *Andrus* v. *Allard*, *supra*, 444 U.S. at 65.

2. *The essential issue is the validity of the open space element in the City's general plan*

In framing its takings claim, appellant variously describes the actions that allegedly effect the taking as "a course of regulatory conduct" (Br. 18) and as "regulatory actions" (Br. 23). Those "regulatory actions" took three forms: (1) the rezoning of part of the property in 1973; (2) the City's proposal at one point to acquire part of appellant's property and its later abandonment of the proposal; and (3) the identification of part of appellant's property as coming within the "open space" element of the

[9] The property owners' claim in *Andrus* v. *Allard*, *supra*, that they would be unable to gain any economic advantages from eagle feather artifacts they owned because they were prohibited from selling them was found unpersuasive by the Court because the owners retained the rights to donate or devise their property, and had alternatives such as displaying the artifacts for an admission charge. 444 U.S. at 65–66.

general plan. The first two of these actions are patently insufficient as even a partial basis for any takings claim.

Because appellant essentially contends (Br. 27) that the only reasonable use for its property is an industrial use, the gravamen of its complaint concerning the 1973 rezoning is the change with respect to industrial (M-1-A) zoning. Yet appellant concedes (Br. 7) that of the approximately 116 acres originally zoned M-1-A, "[a] substantial portion (approximately 77 acres)" retained that designation after the rezoning. In addition, 50 acres of the segment zoned for agricultural holding (A-1-1) not only remained in that category but were designated for future industrial use on submission of a specific development plan (A. 39). In the damages trial, witnesses, including one of the appellant's witnesses, testified (Tr. 507, 932–933) that, apart from the operation of the open space plan, they saw no problems in obtaining the City's permission to use either the 77 acres zoned M-1-A or the 50 acres designated for future industrial use. Since this would amount to industrial development on a greater acreage than was zoned for industrial use when appellant purchased the property (A. 37), a contention that the new 1973 zoning restrictions deprived appellant of any reasonable use of its property is frivolous.

The trial court (A. 36–42) made no specific factual finding that the City's listing part of appellant's property for purchase, and later deleting the property from that list after a bond issue failed, were actions taken in bad faith or that they permanently deprived the property of all value. See *Agins* v. *City of Tiburon*, *supra*, slip op. 6–7 n.9. Indeed, the trial court found that June 19, 1973, was the critical date on which the property passed from "property [with] substantial fair market value" to what the court characterized as property for which there existed "no practical, beneficial, or economic use" (A. 41, 42); the listing of the Company's property for possible acquisition occurred *before* June of 1973 (A. 40); and the deletion of the property from the list of proposed acquisitions occurred after September 1973 (A. 41). Thus, even accepting the court's characterization of the property before and after the asserted taking, it is clear that the proposal to acquire the property and the decision to abandon that proposal are simply irrelevant to the takings claim. And, as this Court noted in *Agins* v. *City of Tiburon*, *supra* (slip op. 7 n.9), in rejecting a similar contention with respect to an abortive attempt to acquire the property at issue: "Mere fluctuations in value during the process of gov-

ernmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.'" *Ibid.*, quoting from *Danforth* v. *United States*, 308 U.S. 271, 285 (1939).

3. *Appellant did not prove a taking because it did not conclusively establish what uses the City would prohibit under the open space element of the general plan*

Contrary to appellant's contention (Br. 30–35), the decision of the Court of Appeal on remand from the California Supreme Court appears to have unsettled the trial court's finding (A. 42) that "it would have been totally impractical and futile for [appellant] to have applied to [the] City for the approval of any development of the property designated as open space or the remainder of the subject property." The Court of Appeal expressly noted (A. 66) that, while appellant complained that it had been "denied all use of its land which is zoned for agriculture and manufacturing but lies within the open space area of the general plan," appellant had "not made application to use or improve the property nor [had] it asked [the] City what development might be permitted." The Court concluded (*ibid.*) that if the appellant wanted to pursue an action for administrative mandamus on the theory that the City "had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element or by applying the zoning and general plan unconstitutionally," it would have to resolve the "disputed fact issues" at retrial.

The trial court's futility finding in fact had so little support in the record that it virtually invited reversal. It rested primarily on the speculations of three of appellant's witnesses,[10] an assumption that all zoning would have to be changed to conform to the open space elements of the general plan,[11] and a further assumption that no industrial development, whatever its design or

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[10] Appellant's evidence at trial consisted merely of the speculations of three witnesses; one, an employee of appellant, knew (Tr. 79–80) of no action of the City which supported his conclusion; the second, an attorney representing a plaintiff in a similar case, conceded (Tr. 91, 97) that he knew of an instance where approval did occur and of only one denial; and the third based his conclusion on occurrences in other jurisdictions (Tr. 276–280).

[11] Under California law, cities and counties are required to have a local open space plan for the comprehensive and long-range conservation of open space land within their jurisdictions. Cal. Gov't Code § 65302(e) (West Supp. 1980). It is not clear as a matter of state law whether the City was bound to conform its

density, would be regarded as consistent with an open space plan.[12] Directly contradicting those assumptions and speculations was testimony by City employees responsible for the City's land-use policies indicating that an open space planning designation is not equivalent to a zoning classification (Tr. 200), not necessarily inconsistent with industry (Tr. 333), and not, in itself, a ground for denying a development permit (Tr. 337). Moreover, the particular open space plan challenged by appellant provides that a "sensitively designed and sited" nuclear power plant might be compatible with open space preservation (Ex. 11 at 24). Finally, the California Supreme Court has squarely rejected, as a matter of state law, the notion that a designation in a city's general plan, even a designation of acquisition, can ever amount to a taking of property. See *Selby Realty Co.* v. *City of San Buenaventura*, 10 Cal. 3d 110, 118–121, 514 P.2d 111, 116–118, 109 Cal. Rptr. 799, 804–806 (1973); *Helix Land Co.* v. *City of San Diego*, 82 Cal. App. 3d 932, 944, 147 Cal. Rptr. 683, 689 (1978). See also DiMento, *Improving Development Control Through Planning: The Consistency Doctrine*, 5 Colum. J. Envt'l L. 1, 38–39 (1978).

If it is not a closed question whether the mere designation of appellant's property as open space in the general plan would preclude the City from granting appellant permission to use at least a portion of its property for industrial development, then the record simply does not permit an assessment whether the plan, as applied to appellant's property, amounts to a taking, because the record does not show what uses are available to appellant under that plan. Appellant's case would then rest on restrictions imposed by the zoning classifications and the City's

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zoning to the open space elements, however. The state statutory requirement that zoning changes be consistent with the open space element of a general plan did not apply to a charter city such as San Diego when the 1973 general plan was adopted. Cal. Gov't Code § 65803 (West 1966). See also *id.* at § 65700 (West Supp. 1980). There was, however, some testimony suggesting a City policy of consistency between zoning and the general plan (Tr. 365–368).

[12] The general plan defined "open space" as "any urban land or water surface that is *essentially* open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes" (Ex. 11 at 2 (emphasis added)). There is no explanation of how much construction might be allowed in a large area without detracting from its "essentially open or natural" character. The City's planning director testified, however (A. 140), that industrial development could well be consistent with the general plan, depending on the design and the incorporation of open space within the development itself.

abandoned proposal to purchase the property (see *Agins* v. *City of Tiburon*, *supra*, slip op. 4); and, as shown (pages 10–12, *supra*), those actions of the City are clearly insufficient bases for any taking claim.

4. *Appellant did not prove a taking because it agreed that the plan was a permissible measure taken for the public welfare and it failed to show that reasonable investment-backed expectations had been frustrated*

Even assuming that the application of the open space element in the City's general plan would preclude the City from permitting industrial development on appellant's property, it is not established under this Court's recent precedents that the City's action is invalid as an uncompensated taking of appellant's property.

Appellant evidently views the objective of the open space element in the general plan as an aim "to preserve open space on the theory that it is a physical, social, aesthetic, economic, and ecological asset" (Br. 19), and it concedes that such an aim "is not an impermissible goal or objective of governmental action in the pursuit of the public welfare and the common good[.]" It contends, instead (Br. 29–30), citing the trial court's finding that appellant "was left with land that was practically, beneficially, and economically useless," that the effect of the plan's open space element on its property constitutes a taking because it has "an unduly harsh impact * * * frustrating the owner's legitimate economic expectations."

But the trial court's finding is in large part a legal conclusion, and it fails to take into account certain undisputed evidence. Appellant's principal "investment-backed expectation" (*Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124) in purchasing the property was to build a power plant on the land (A. 69), and that expectation was frustrated not by any action of the City—whose general plan specifically provided that such a plant might be consistent with the open space designation (see page 13, *supra*)—but by the fact that appellant discovered after purchasing the property that because of the character of the land, construction of the plant was an unreasonable use (A. 80). Selling the property to the City through an inverse condemnation suit simply permitted appellant to recoup an investment predicated on a mistaken assumption about the

character of the land it was buying. The record also indicates that the property still retained some value (at least $161,000—the "nominal" worth one of appellant's own witnesses was willing to assign to it (A. 126)) and that purchasers might be found for it (*ibid.*). This is substantially below the value found by the jury for the property absent restrictions on industrial development; but, as this Court has noted, where the regulation in question is "reasonably related to the promotion of the general welfare," severe diminutions in value have not been found sufficient to establish a taking. *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 131. See also *Andrus* v. *Allard*, *supra*, 444 U.S. at 66; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962).

B. A Police Power Measure that Prohibits A Harmful Use of Property Should Not Be Deemed a Taking Even if that Harmful Use is the Only Economically Profitable Use

Even if the Court finds that, under the test discussed in Section A above, the economic impact of restrictions on appellant's use of its property is to leave appellant no economically profitable use, it does not necessarily follow that appellant has established an unconstitutional taking.

The record in this case indicates that the use appellant contended was the only profitable use of its property—industrial development requiring a large volume of dirt fill to prepare the surface for construction—may harm the condition of surrounding lands and waters and, given the fact that the property lies in a floodplain, raises questions concerning public safety. The City's open space planning was intended to take such matters into account (see page 21, *infra*). We submit that a government may restrict harmful uses of property without triggering the Takings Clause, even where the prohibited use is the only economically profitable use. Because appellant did not apply to the City for a development permit so that its construction plans could be assessed in light of safety and nuisance-prevention concerns, and did not otherwise establish that its plans for transforming the land into an industrial park would not threaten public safety or the property of others, appellant did not establish that its property has been unconstitutionally taken by the City.

1. *Decisions of this Court suggest that police power measures may validly prevent harmful uses of property so long as the measures are not arbitrarily harsh*

Decisions of this Court lend substantial support to the view that a governmental body may prohibit noxious uses of property without regard to whether that prohibition leaves the owner with other means of profitably exploiting his property.[13] Thus, although Mr. Justice Rehnquist, joined by the Chief Justice and Mr. Justice Stevens, would have found the Landmark Preservation Law at issue in *Penn Central Transportation Co.* v. *New York City*, *supra*, to be a taking, he accepted the unqualified proposition that "the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use." 438 U.S. at 144 (Rehnquist, J., dissenting). See also *Moore* v. *City of East Cleveland*, 431 U.S. 494, 513 (1977) (Stevens, J., concurring) (basic right to use property "has always been limited by the law of nuisance"). In this regard, he cited this Court's decision in *Mugler* v. *Kansas*, 123 U.S. 623 (1887), in which the Court upheld, against a Fourteenth Amendment challenge, a law absolutely prohibiting the operation of a brewery. The *Mugler* Court distinguished (123 U.S. at 667–668) *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), a decision in which an overflow onto plaintiff's land caused by a state-owned dam was found to be a taking under a state constitutional provision. It noted that the question in *Pumpelly* arose under the power of eminent domain. By contrast, the Court explained (123 U.S. at 668–669):

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to

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[13] The majority opinion in *Penn Central* (438 U.S. at 133–134 n.30) criticized this distinction in dictum, and commentators have been divided on its usefulness. Compare, *e.g.*, Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1196–1200 (1967), with Dunham, *A Legal and Economic Basis for City Planning*, 58 Colum. L. Rev. 650, 663–669 (1958). Professor Sax's thesis that the government may prohibit uses of property that have "spillover effects" without "triggering the takings clause" is a variant of the noxious use theory. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 155–161 (1971). Our submission does not remotely suggest that *Penn Central* was wrongly decided. It would only mean that in noxious use cases—which in our view, do not include *Penn Central*—the Court would not have to consider the economic value of the remaining uses, except in the context of an inquiry whether the prohibition was an arbitrarily and unnecessarily harsh means of achieving the legislative purpose (see page 19, *infra*).

> the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

In accord with that principle, the Court held in *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), that a municipal government could, without offending the Fourteenth Amendment, prohibit the continued operation of a brick-making plant, despite the owner's unrefuted claims that because of large clay pit excavations, the land could not be used for any other purpose (*id. at 405) and that it was financially prohibitive to transport the clay for manufacture into bricks elsewhere (id.* at 411). Because the evidence showed "that the fumes, gases, smoke, soot, steam and dust arising from petitioner's brick-making plant have from time to time caused sickness and serious discomfort to those living in the vicinity" (*id.* at 408), the prohibition was constitutional.[14]

It is true that *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), established a "general rule" that "while property

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[14] See also *Reinman* v. *City of Little Rock*, 237 U.S. 171 (1915) (prohibiting operation of stables in city where they produced "offensive odors" and were "productive of disease"); *Pierce Oil Corp.* v. *City of Hope*, 248 U.S. 498 (1919) (upholding a statute prohibiting storage of oils in tanks within 300 feet of dwellings, given danger of explosions); *Miller* v. *Schoene*, 276 U.S. 272, 279–280 (1928) (damage to apple orchards inflicted by diseased cedar trees justified law ordering destruction of cedars). See, generally, F. Bosselman, D. Callies & J. Banta, *The Taking Issue* 124–138 (1973).

may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415. The notion of "going too far" appears, moreover, to have been conceived of as a destruction of the profitable uses of property, without compensation to the owner, although Mr. Justice Holmes cautioned that "this is a question of degree" (*id.* at 416). But the issue there arose in a private injunctive suit, concerning an established use of the property, with the plaintiffs relying on a state law prohibiting certain mining operations to support their claim that, notwithstanding their purchase of property subject to the grantor-coal company's reservation of subsurface mining rights, and notwithstanding their waiver of damages, they were entitled to an injunction against any mining that threatened subsidence of the ground beneath their house. Mr. Justice Holmes appeared to be strongly influenced by the fact that the plaintiffs had "seen fit to take the risk of acquiring only surface rights" (*ibid.*) and were invoking the state mining law as a means of abrogating their bargain. He acknowledged (*id.* at 415) the validity of laws of general application which "secured an average reciprocity of advantage that has been recognized as a justification of various laws."[15]

This Court has repeatedly cited the "general rule" in *Pennsylvania Coal*, but it has never relied upon it to find that a police power regulation restricting the uses of property is invalid under the Takings Clause.[16] Reliance on that rule may

[15] A number of courts have found *Pennsylvania Coal* inapplicable where such laws of general application are concerned. See, *e.g.*, *Marblehead Land Co.* v. *City of Los Angeles*, 47 F.2d 528, 532 (9th Cir.), cert. denied, 284 U.S. 634 (1931); *Sibson* v. *State*, 115 N.H. 124, 336 A.2d 239 (1975); *Consolidated Rock Products Co.* v. *City of Los Angeles*, 57 Cal.2d 515, 528–529, 370 P.2d 342, 350–351, 20 Cal. Rptr. 638, 646–647, appeal dismissed for want of a substantial federal question, 371 U.S. 36 (1962); *West Bros. Brick Co.* v. *City of Alexandria*, 169 Va. 271, 192 S.E. 881, appeal dismissed for want of a substantial federal question, 302 U.S. 658 (1937).

[16] See, *e.g.*, *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962); *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 127; *Andrus* v. *Allard*, *supra*, 444 U.S. at 66. In *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928), the Court struck down a zoning ordinance, but it did so because it determined that the ordinance did not promote the public health, safety, convenience or welfare and thus did not survive challenge under the Due Process Clause. In *Armstrong* v. *United States*, 364 U.S. 40 (1960), the Court, relying in part on *Pennsylvania Coal*, found (364 U.S. at 48) that the government's exercise of an option under a ship construction contract was a taking because it totally destroyed a materialman's lien; but the case involved no police power regulation, and—as the Court pointed out (*id.* at 49)—the government itself was "the direct, positive beneficiary."

well be justified in cases in which a law produces some desideratum for the general public by imposing the burden on a property owner whose use of his property in no way creates a public nuisance or otherwise endangers public health or safety. But where a "forbidden use is dangerous to the safety, health, or welfare of others" *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 145 (Rehnquist, J., dissenting)), the Takings Clause should not be deemed a restraint on the government's efforts to eliminate the danger; and *a fortiori*, the one creating the danger should not expect to be paid for desisting whenever he can show that noninjurious uses of his property will produce no economic profits.

This, of course, does not leave government free to act arbitrarily in its exercise of the police power to prevent harms. Although, since the demise of substantive due process, the Court no longer sits "as 'a superlegislature'" (*Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963) (citation omitted); see also *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 223–224 (1949)), it will still examine a law to determine whether "it bears a reasonable relation" to a "legitimate" government purpose. *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124–125 (1978). The mere invocation of public health and safety would not suffice to save a law that employed means not reasonably related to the achievement of the noble aims invoked; and unnecessary harshness in such a measure should not survive the test. In any event, the owners of real property who wished to use it in ways deemed by local, state, or federal legislatures to be injurious to public health or safety or to create a public nuisance would enjoy the same protections against oppressive government action that those with other types of property interests enjoy.[17]

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[17] See, *e.g.*, *North Dakota Pharmacy Board* v. *Snyder's Stores*, 414 U.S. 156 (1973) (upholding regulation eliminating nonpharmacists from ownership of pharmacies); *Daniel* v. *Family Security Life Insurance Co.*, *supra*, 336 U.S. at 223–224 (upholding prohibition with the effect of destroying an existing funeral insurance company); *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938) (Court found no Fifth Amendment "taking," though the defendant was prevented from shipping filled milk with the property accordingly rendered worthless); *Eberle* v. *Michigan*, 232 U.S. 700, 707 (1914) (liquor); *Baccus* v. *Louisiana*, 232 U.S. 334, 337–338 (1914) (prohibition of itinerant vendors); *Purity Extract & Tonic Co.* v. *Lynch*, 226 U.S. 192 (1912) (liquor); *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306, 320–321 (1908) (upholding order to destroy unwholesome food though value might otherwise remain); *Reduction Co.* v. *Sanitary Works*, 199 U.S. 306, 321–325 (1905) (up-

2. *Appellant's use of its property for industrial development would be likely to endanger surrounding lands and waters*

Appellant's property is located in a fragile ecological zone. It is part of an estuary and a wetland and lies in a floodplain and a tidal basin; substantial portions of it are subject to tidal innundation (A. 64). Appellant at no time contended that the property in question could be used in its natural state for industrial development. Even that portion of the property that was not subject to tidal action, which appellant asserted was suitable for some 140 to 150 acres of industrial development (Tr. 711), would require at least four feet of fill—a total of approximately 1.255 million cubic yards (Tr. 566, 905). In a sensitive lagoon and wetland area such development can be extremely damaging. Indeed, a representative of the California Coastal Commission testified (Tr. 961) that "as development has occurred inland, there has been a moving of additional apparent silt into the lagoon and [an acceleration of] the problem of erosion."[18] Because appellant had submitted no plans to the Coastal Commission (indeed had never drawn up any specific plans at all for any purpose (A. 80)), the Commission witness could not say absolutely whether the development appellant deems essential to its profitable

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holding cremation requirement for garbage, though value might otherwise remain); *Powell* v. *Pennsylvania*, 127 U.S. 678 (1838) (upholding state law prohibiting the manufacture of oleomargarine, and the exclusion of evidence intended to show that because of preexisting investment, a business would be destroyed); *Patterson* v. *Kentucky*, 97 U.S 501, 506 (1878) (prohibition of sale of condemned oil).

This Court has emphasized that it does not "distinguish among different kinds of property in applying the Due Process Clause." *North Georgia Finishing, Inc.* v. *DI-Chem, Inc.*, 419 U.S. 601, 608 (1975). See also *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("The right to enjoy property without unlawful deprivation * * * is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account.").

[18] Coastal zone wetlands are a "vital national resource of critical importance to the entire nation" and their protection and conservation is state and national policy. See Protection of Wetlands, Exec. Order No. 11990, 43 Fed. Reg. 26961 (1977); Coastal Zone Management Act of 1972, 16 U.S.C. 1451(b), (d), 1452(a); California Coastal Act of 1976, Cal. Pub. Res. Code §§ 30000–30900 (West Supp. 1980). They provide spawning grounds, habitat, and food sources for fish and wildlife, and preserve water quality by acting as pollution filtration systems converting many organic pollutants to useful nutrients. Wetlands help to stabilize the coast by preventing erosion, and serve as a buffer to protect inland property from the effects of storms and flooding. See generally, Council on Environmental Quality, *Our Nation's Wetlands* (1978).

exploitation of the property would damage the surrounding waters. The most he could venture was that a development "dramatically scaled down" from others existing to the east of the subject property might be acceptable in the "far southeastern end" of the property (Tr. 968-969).[19]

The fact that appellant's property lies in a floodplain raises both a question of nuisance, stemming from development, and public safety considerations.[20] Floodplains aid in moderating floods, maintaining water quality, and recharging ground waters; and development in such areas has received increased attention in recent years owing to the rising level of flood losses and resulting costs to the general public. U.S. Water Resources Council, *Floodplain Management: Guidelines for Implementing Executive Order No. 11988*, 43 Fed. Reg. 6030, 6046-6047 (1978). As President Carter stated when issuing Executive Order No. 11988, unwise floodplain use and development "pose a severe threat to human life, health, and property." 13 Weekly Comp. of Pres. Doc. 806 (May 24, 1977).[21] The City's open space plan called for regulating land use so as to preclude harmful development in such areas (Ex. 11 at 4), and contemplated the eventual application of appropriate floodplain zoning (Ex. 11 at 8 n.6). Appellant evaded this part of the planning process by simply filing its lawsuit to compel the purchase of its land.

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[19] The jury's determination of the value of the property on the day before the open space element of the general plan was adopted in no way amounts to a finding that the development of appellant's land according to its "highest and best use" would not be environmentally damaging. At most it indicates the jury's belief that a prudent purchaser would be willing to risk a denial of a development permit by the Coastal Commission.

[20] The need to accommodate competing landowners' interests in areas such as floodplains has historically been a problem and courts have looked with disfavor upon developers who inflict injury upon neighboring landowners. California courts recognize the priority of right of the landowner affected adversely by another's modifications and perform a balancing of the equities. See *Keys* v. *Romley*, 64 Cal.2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966). See, generally, Dunham, *Flood Control Via the Police Power*, 107 U. Pa. L. Rev. 1098, 1100 (1959).

[21] Similarly, Congress has found that flood losses are "increasing at an alarming rate," 42 U.S.C. 4002(a)(1), (5) and "that the Nation cannot afford the tragic losses of life and property" which occur. The Flood Disaster Protection Act is designed to encourage "State and local measures which, to the maximum extent feasible, will —(1) constrict the development of land which is exposed to flood damage where appropriate, [and] (2) guide the development of proposed construction away from locations which are threatened by flood hazards * * *." 42 U.S.C. 4102(c).

In sum, appellant's assertion (Br. 25) of a "fundamental" and unrestricted "right to develop" any land it owns unless the government pays it to refrain takes no account of the damage that such development can wreak on surrounding lands and waters and the danger it can pose to public safety. The record here fails to establish that appellant's asserted "highest and best use" of its land would not amount to the equivalent of a public nuisance that the City could constitutionally prohibit notwithstanding any finding that noninjurious uses would not be financially rewarding. Accordingly, appellant has not demonstrated that any barriers the City might erect to its proposed industrial development constitute a taking of property in violation of the Fifth and Fourteenth Amendments.

II. THE FIFTH AND FOURTEENTH AMENDMENTS DO NOT REQUIRE THAT A STATE COURT AFFORD A REMEDY IN DAMAGES FOR A LAND-USE REGULATION HELD TO BE AN UNCONSTITUTIONAL TAKING OF PROPERTY, WHERE THE REMEDIES OF DECLARATORY RELIEF AND MANDAMUS ARE AVAILABLE

A. INTRODUCTION

Appellant contends (Br. 35–44) that when a state court determines that local land-use planning, including a zoning ordinance and a city's general plan, has so exceeded the limits of the police power as to constitute an unconstitutional taking of property, the court is not free to limit the plaintiffs to declaratory relief and mandamus, but must afford them the right to recover

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Federal concern over this issue is reflected in the National Flood Insurance Program, 42 U.S.C. 4001 *et seq.*, administered by the Federal Emergency Management Agency. By law, federal agencies may not approve grant money, mortgage backing, direct loans, most disaster relief, or any other taxpayer funds to support the purchase, construction or improvement of property located in a community's identified flood-prone areas, unless the community adopts appropriate floodplain measures. These federal measures, including a prohibition on development that would increase flood heights (see 44 C.F.R. 60.3(d)), have been upheld against a taking challenge. See *Texas Landowners Rights Ass'n* v. *Harris*, 453 F. Supp. 1025, 1031–1032 (D.D.C. 1978) aff'd, 598 F.2d 311 (D.C. Cir.), cert. denied, 444 U.S. 927 (1979); see also *Turner* v. *County of Del Norte*, 24 Cal. App.3d 311, 101 Cal. Rptr. 93 (1972); *Krahl* v. *Nine Mile Creek Watershed District*, 283 N.W.2d 538 (Minn. 1979); *Turnpike Realty Co.* v. *Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973).

damages on a theory of inverse condemnation.[22] We challenge that proposition.[23]

At the outset, we note that it is not entirely clear that no form of damages is ever available in the California courts to those challenging regulatory measures as takings. In *Agins* v. *City of Tiburon*, 24 Cal. 3d 266 (1979) (J.S. App. F), aff'd, No. 79-602 (June 10, 1980), the California Supreme Court stated only (J.S. App. F-2 to F-3) that when a landowner establishes that a zoning ordinance is constitutionally infirm because it "substantially limits use of his property" he "may not recover damages on the theory of inverse condemnation." In an earlier decision, *HFH, Ltd.* v. *Superior Court of Los Angeles County*, 15 Cal.3d 508, 517-520, 542 P.2d 237, 244-245, 125 Cal. Rptr. 365, 372-373 (1975), cert. denied, 425 U.S. 904 (1976), in which the California Supreme Court expressly considered the question whether "*interim* damages" (*i.e.*, damages to compensate for economic losses suffered before a zoning ordinance is invalidated by a court) might be awarded to plaintiffs who showed a reduction in the market value of property induced by zoning, the court concluded that such damages would not be available on *that* showing because a diminution in value, alone, does not prove a taking; but the court did not address the question whether such a damage claim might be added to a "mandate action" where facts showing a taking were established. 15 Cal.3d at 519-520, 542 P.2d at 245, 125 Cal. Rptr. at 373.[24] The

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[22] Contrary to repeated suggestions of the Counsel of the Pacific Legal Foundation (San Diego Urban League Br. 9), there are no allegations or evidence that the City of San Diego has engaged in exclusionary or otherwise discriminatory practices in adopting the challenged land-use measures. Moreover, the proper remedy for an exclusionary zoning ordinance would be invalidation and not money damages for a taking since such zoning must be struck down as invalid and cannot be equated to a proper exercise of the power of eminent domain.

[23] If the Court determines, contrary to our submission (pages 12-13, *supra*), that the court of appeal, in its decision on remand from the California Supreme Court, held only that the inverse condemnation remedy was unavailable, then this Court could affirm the judgment of the court of appeal without reaching the question whether a taking has occurred.

[24] In *HFH, Ltd.*, the California Supreme Court treated the issue of the availability of damages based on an inverse condemnation theory as separate from the issue of the availability of interim damages as part of a writ of mandate (see Cal. Civ. Proc. Code § 1095 (West Supp. 1980)). In discussing the latter issue, the California court did suggest that the state tort immunity statute (Cal. Gov't Code § 818.2 (West 1966)) would preclude liability for interim damages based

California Supreme Court's decision in *Agins* also did not upset settled California law that a local government's bad faith pre-condemnation activities could give rise to an inverse condemnation. See *HFH, Ltd.* v. *Superior Court of Los Angeles County*, *supra*, 15 Cal.3d at 516 n.14, 542 P.2d at 243 n.14, 125 Cal. Rptr. at 371 n.14; *Toso* v. *City of Santa Barbara*, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210, 219–220 (1980), petition for cert. pending, No. 80–205.

Finally, the California Supreme Court has not necessarily foreclosed the possibility of a damages remedy where landowners, unlike appellant in this case, sue under 42 U.S.C. 1983, alleging that a zoning ordinance deprives them of their constitutionally protected property rights under color of state law. See generally, Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 Yale L.J. 1134, 1136–1140 (1980). The California Supreme Court has held that state courts must entertain Section 1983 actions (*Brown* v. *Pitchess*, 13 Cal.3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975)), and that court has not had occasion to decide what remedies are available where claims similar to those brought by appellants in the present case are raised under that federal statute. Of course, it is likely that the California Supreme Court would conclude that at least the "inverse condemnation" damages remedy is unavailable there for the same reasons it found the remedy unavailable in *Agins*, the decision controlling this case. See *Jacobson* v. *Tahoe Regional Planning Agency*, 474 F. Supp. 901 (D. Nev. 1979), appeal pending, No. 80–4039 (9th Cir.) (federal court holding that "damages for inverse condemnation" are unavailable in challenge to land-use law under 42 U.S.C. 1983).[25]

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on a claim analogous to state tort law, but avoided addressing the question of the propriety of liability for interim damages (such as holding costs) if such a claim was of constitutional dimension.

[25] We do not, like appellant (Br. 37–38), read this Court's decision in *Owen* v. *City of Independence*, No. 78–1779 (Apr. 16, 1980), as compelling the conclusion that, in suits brought under 42 U.S.C. 1983, injunctive relief is a constitutionally inadequate remedy for land-use regulations found to constitute takings. The constitutional tort involved in *Owen* was a stigmatizing discharge of a city employee effected without notice or hearing, and the Court held only that the city enjoyed no qualified immunity in suits brought under Section 1983. While the Court stated (slip op. 28) that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees," it acknowledged the possibility that in some cases "countervailing considerations [might] counsel otherwise" (*ibid.*). As we explain below (pages 29–31, *infra*), we believe such considerations are present in cases such as this: the restraining effects of the law complained of can be lifted by

In these circumstances, this Court may deem it premature to decide now whether a damages remedy must, as a matter of federal constitutional law, be made available to those challenging land-use regulations as takings in state courts. See *Phyle* v. *Duffy*, 334 U.S. 431 (1948).

B. A Zoning Ordinance Deemed Invalid as a Taking of Property Without Compensation Is Not the Equivalent of an Exercise of the Power of Eminent Domain

Appellant's claim of entitlement to damages in "inverse condemnation" (Br. 35–41) appears to be essentially a claim "based on the right to recover just compensation for property taken by [the City] for public use in the exercise of its power of eminent domain" (*Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)). This Court has recognized two ways in which a government, the United States, for example, may exercise that power (*United States* v. *Dow*, 357 U.S. 17, 21 (1958)): "it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings." See also *United States* v. *Clarke*, No. 78–1693 (Mar. 18, 1980), slip op. 2–3; *United States* v. *Dickinson*, 331 U.S. 745, 747–748, 749 (1947). Appellant is proposing a third way in which the eminent domain power may be exercised: the enactment of a regulatory measure that is ultimately held by a court to be unconstitutional because, if enforced, it will deprive a landowner of any reasonable beneficial use of his property without compensating him for the deprivation. Appellant alternatively refers (Br. 35–44) to its claim of entitlement as a "cause of action" in "inverse condemnation" and

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invalidation, and the requirement of a damages remedy, given the enormous sums involved in enforced purchase of large tracts of land, would unnecessarily constrain legitimate land-use planning.

We note that the Court's reference in *Owen* (slip op. 17; footnote omitted) to a traditional understanding that municipalities "[were] deemed responsible for any private losses generated through a wide variety of its operations and functions * * * [including] uncompensated takings" does not define the types of takings referred to. However, in C. Rhyne, *Municipal Law* 738 n.42 (1957), cited by the Court (slip op. 17 n.21), the only takings case mentioned in that connection is *Jacobs* v. *Seattle*, 93 Wash. 171 (1916), a case in which the defendant municipality had constructed an incinerator for burning garbage on land adjacent to that occupied by plaintiff, and the fumes invaded plaintiff's property. We agree that when a government physically invades or seizes private property, damages are an appropriate remedy (see pages 26–27, *infra*).

as a "remedy" in "money damages." In any event, appellant rests its claim on the Federal Constitution.

In advancing that claim, appellant overlooks a vital distinction between the enactment of a law regulating the uses of property and the two types of government action described in *United States* v. *Dow*, *supra*. It is logical to speak of "the *choice* of the condemning authority to take property by physical invasion" or "by a formal condemnation action" (*United States* v. *Clarke*, *supra*, slip op. 5 (emphasis supplied)) and to award compensation for the property thus taken. In the former case, the government has appropriated property in a manner that precludes its return, giving rise to an implied promise to pay if the appropriation of property is authorized by a valid statute (see *Dugan* v. *Rank*, 372 U.S. 609, 619–623 (1963); *Hooe* v. *United States*, 218 U.S. 322 (1910)). In the latter, of course, the government has expressly announced its intention to pay by filing the proceeding.

Where a legislative body has enacted a regulatory measure such as a zoning ordinance, however, it has in effect announced a decision to define property rights rather than to acquire them. A government may, up to a point, validly "cut down" property rights without paying where the restriction on such rights is substantially related to the public welfare. *Block* v. *Hirsh*, 256 U.S. 135, 155 (1921). When the government cuts them down unreasonably, one may call the result a taking of property; but it is unreasonable to speak of the government's "choice" to acquire the property or its implied promise to pay compensation. Instead, when a court determines that a regulatory measure is invalid as a "taking," a government is then faced with a different choice: it may continue to restrict the rights and pay for them, or it may forego restricting the rights. See *Pamel Corp.* v. *Puerto Rico Highway Authority*, 621 F.2d 33, 35–36 (1st Cir. 1980).[26]

Appellant (Br. 39–41) and Amicus National Association of Manufacturers (Br. 9) cite decisions of this Court which, they assert, support their view that a damages remedy is constitu-

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[26] Of course, where a land-use statute or regulation is found invalid on the ground that it serves no legitimate public purpose, it would be impermissible even to permit a purchase of the land. Such a purchase could not be treated as a legitimate exercise of the power of eminent domain, since that can be exercised only in the service of a public purpose (see *Berman* v. *Parker*, 348 U.S. 26 (1954)), and by the same token the property could not be said to be taken, in the language of the Takings Clause, "for a public use."

tionally compelled for any regulation of property that may be deemed a taking. But most of the cases cited involve either a condemnation proceeding,[27] appropriations of water in connection with the government's construction and operation of dams,[28] or overflows onto private land from government dam projects.[29] Damages for such takings are available either on a theory of implied promise to pay as a result of the invasion or appropriation (*United States* v. *Lynah*, 188 U.S. 445, 474 (1903)) or by congressional authorization under the Tucker Act, 28 U.S.C. 1346(a) (see, *e.g.*, *Dugan* v. *Rank*, *supra*, 372 U.S. at 611). Similarly, the references in *United States* v. *Clarke*, *supra*, to compensable takings by means other than condemnation proceedings are clearly to physical seizures (slip op. 2–3, 5). No remedy questions were raised in *Kaiser Aetna* v. *United States*, 444 U.S. 164, 180 (1979) or *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), but in any event, those cases plainly do not support appellant's contention that damages are a constitutionally required remedy for an invalid police power regulation.[30] Finally, in the *Regional Rail*

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[27] *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893).

[28] *Dugan* v. *Rank*, *supra*; *Fresno* v. *California*, 372 U.S. 627 (1963); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

[29] *Danforth* v. *United States*, 308 U.S. 271 (1939); *Olson* v. *United States*, 292 U.S. 246 (1934); *United States* v. *Lynah*, 188 U.S. 445 (1903). In *Hurley* v. *Kincaid*, 285 U.S. 95 (1932), plaintiff alleged that construction of a federal floodway project would flood his land and unsuccessfully sought to enjoin it; the Court held that damages would be available to him under the Tucker Act, 28 U.S.C. 1346(a) and 1491, for damage done by any overflow. Despite plaintiff's allegation that the very existence of the statute authorizing the project placed a "cloud upon [his] title," and "materially affected and impaired the value thereof" (285 U.S. at 101 n.1), the Court concluded that no compensable injury would occur until the government actually commenced the project.

[30] *Kaiser Aetna* involved the government's exercise of its navigational servitude to require an owner of a pond-marina, who planned to lease spaces there for a fee, to permit the public to enter free of charge. The Court stated (444 U.S. at 180) that *if* the government wished to impose that public access condition, it would have to compensate the owner for the intrusions; but it acknowledged (*id.* at 179) the government's right to regulate or prohibit any dredging that would impair navigation in the adjacent bay, and it did not suggest that compensation would be required for any economic loss stemming from government action of that type. Appellant's quotation from *Penn Central* (Br. 41) is misleading. It joins fragments of two sentences, omitting critical language from the Court's reference to the question "whether a particular restriction *will be rendered invalid by the government's failure* to pay for any losses proximately caused by it * * *" (438 U.S. at 124 (emphasis added)).

Reorganization Act Cases, 419 U.S. 102 (1974), which did not involve a physical seizure, the Court did hold that the property owners would be entitled to damages if the statute at issue there operated to deprive them of full compensation for the rights they were required to surrender; but the Court satisfied itself that payment, rather than invalidation of the statutory scheme, was the congressional choice.[31]

In the present case, it cannot be said that the City chose to acquire appellant's property even if it is determined that the open space designation amounted to a use-restriction that is invalid as a taking. Indeed, the City adopted its open space plan in response to a state statute that expressly declines to authorize a city to adopt land-use measures that would constitute a taking of property without compensation. See Cal. Gov't Code § 65912 (West Supp. 1980). A finding that the City misjudged the degree to which it could validly regulate the uses of the property at issue here does not logically compel the conclusion that the City would choose to purchase it rather than amend the use restrictions.

C. The Equitable Remedies Available in the California Courts are Adequate Remedies for Claims that a Land-Use Regulation Deprives a Landowner of Substantially All Beneficial Use of Its Property

Appellant also asserts (Br. 41–44) that it is constitutionally entitled to a damages remedy because invalidation of zoning and planning measures found to constitute a taking would be an inadequate remedy for constitutional violations. The argument represents at least implicit recognition of principles of federalism affording a state court broad discretion in fashioning remedies for violations of federal rights, so long as the state court affords an adequate remedy. See generally Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118 (1969); Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181, 181–187, 191–193 (1969); Note, *State Remedies for Federally-Created Rights*, 47 Minn. L. Rev. 815, 830–834 (1963). This Court has interfered with a state court's choice of

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[31] The Court noted (419 U.S. at 125–136, 148) that the Tucker Act remedy had not been withdrawn by Congress when enacting the Regional Rail Reorganization Act; and it further noted in connection with both types of takings alleged in the case (*id.* at 129, 148) that the legislative history of the Rail Act indicated that Congress had intended to provide the minimum amount of compensation required for the Act to be constitutionally valid.

remedy for violation of a federal right only where the sole remedy offered in the state courts is wholly inadequate, in effect denying any relief for the violation.[32] Indeed, the fact that a state *offers* an adequate remedy amounts to an adequate state ground for a decision even if the party seeking review in this Court were not accorded the remedy because he failed to apply for it. *Phyle* v. *Duffy*, 334 U.S. 431 (1948); *Woods* v. *Nierstheimer*, 328 U.S. 211, 214, 216 (1946); *Mellon* v. *McCafferty*, 239 U.S. 134 (1915).

The facts alleged in the appellant's complaint in no way suggest that, if the measures at issue here are determined to amount to a taking, the remedies of declaratory relief and mandamus would be inadequate as a matter of constitutional law. A declaration that the measures are invalid would relieve appellant of the restrictions it contends have rendered its property worthless, and were the City, for example, to impose permit requirements that amounted to an attempt to evade the court's decision, the mandamus remedy would permit a court to compel issuance of the permits. See *Selby Realty Co.* v. *City of San Buenaventura*, 10 Cal. 3d 110, 124–126, 514 P.2d 111, 120–122, 109 Cal. Rptr. 799, 807–809 (1973).[33]

Nothing in this Court's decisions suggests that, as a general proposition, the Constitution requires that a damages remedy be made available to those challenging land-use regulations as takings. Indeed, this Court has moved with caution even in de-

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[32] *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 682 (1930); *Ward* v. *Board of County Comm'rs*, 253 U.S. 17 (1920); *Poindexter* v. *Greenhow (The Virginia Coupon Cases)*, 114 U.S. 270, 303 (1884). See also *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 237–242 & n.45 (1977) (discussing adequate remedies for constitutional violation without directing state court to adopt one in particular); *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966) (states free to develop adequate safeguards, other than that devised by the Court, to protect the privilege against self-incrimination during custodial interrogation).

[33] Appellant's suggestion (Br. 42) that the equitable relief permitted in the California courts would be inadequate to remedy the damage for any "temporary or partial taking" need not be considered here. As noted (pages 23–24, *supra*), such a remedy *may* be available in the California courts; but in any event, appellant alleged and proved no facts establishing such special damages. The mere diminution in the market value of the property in the interim does not qualify; and the mere fact that hoped-for profits have not been earned in the interim similarly does not warrant compensation. See *Mosca* v. *United States*, 417 F.2d 1382, 1386 (Ct. Cl. 1969); *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1010 (Ct. Cl. 1967) (Davis, J.). Cf. *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 281–283 (1943); *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 513 (1923).

termining whether a damages remedy is *authorized* in suits, based directly on the Constitution, that are brought in federal courts against federal officials.[34] Plainly, a cautious approach respecting remedies is especially appropriate in the present case, involving State procedures and local governments.

As the First Circuit has recently observed in *Pamel Corp.* v. *Puerto Rico Highway Authority*, *supra*, 621 F.2d at 36 (citations omitted):

> Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy. The federal constitutional right can be secured to the individual without forcing the state to purchase his property. Voiding the offending restriction will make the owner whole. * * * Moreover, once the constitutional line has been drawn, the state or local authority administering the complex structure of land use controls should be free to decide whether the expected benefits from the restriction are worth the cost of the required compensation.

Imposing the remedy will, moreover, have a severely inhibiting effect on even legitimate land use planning; as the damage award in the present case illustrates, recoveries in such cases are likely to be substantially larger than those in other types of constitutional tort suits. Even a few misjudgments, in the form of excessive restrictions in a metropolitan zoning and land-use plan, could virtually deplete a city treasury if each one com-

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[34] Thus, it held in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971), and *Carlson* v. *Green*, No. 78-1261 (Apr. 22, 1980), slip op. 3-4, that damages were an available remedy for particular types of Fourth and Eighth Amendment violations where there were "no special factors counselling hesitation in the absence of affirmative action by Congress." "*Bivens* defendants are federal officials brought into federal court for violating the Federal Constitution. No state interests are implicated by applying purely federal law to them." Slip op. 9-10 n.11. But federalism concerns are certainly a "special factor counselling hesitation" in this case in mandating the availability of a particular remedy in state courts against state defendants.

Similarly in *Davis* v. *Passman*, *supra*, this Court found damages to be an appropriate remedy for a particular equal protection claim under the Due Process Clause of the Fifth Amendment where "there are available no other alternative forms of judicial relief" (442 U.S. at 245); but, as the Court noted (*id.* at 248), "were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." Notably in *Carlson* v. *Green*, *supra*, slip op. 4, the Court also considered the factor whether Congress had provided an alternative remedy which it "declared to be a substitute for recovery directly under the Constitution and viewed as equally effective" (citations and emphasis omitted).

mitted the city to purchasing all of the land found to have been too severely restricted. In view of the absence, up to now, of any settled formula for defining a taking, those with the responsibility for ensuring balanced land development that does not degrade the environment will be faced with scarcely calculable risks of budget-destroying condemnation awards in making complex planning decisions.[35]

In sum, neither logic, precedent, nor policy considerations support appellant's contention that it is constitutionally entitled, on any theory, to a damages remedy should the regulatory and planning measures at issue here be deemed a taking.

CONCLUSION

Either the appeal should be dismissed for want of a substantial federal question or the judgment of the California Fourth District Court of Appeal should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

J. VANCE HUGHES
EDWARD J. SHAWAKER
ANN P. GAILIS
RICHARD J. LAZARUS
E. ROBERT WRIGHT
Attorneys

OCTOBER 1980

[35] Such inhibitions could, moreover, discourage state and local governments from participating in federal environmental programs that depend for their effectiveness on state and local implementation. The Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*, for example, which was enacted to mitigate the destructive effects of intense development pressures on coastal areas, is designed to encourage the States "to exercise their full authority over the lands and waters in the coastal zone by assisting the states * * * in developing land and water use programs * * * of more than local significance." Section 302(h), 16 U.S.C. 1451(h). Under Section 305 of the Act, 16 U.S.C. 1454, grants made by the National Oceanic and Atmospheric Administration have financed up to 80% of the development costs of approved programs over the last five years.

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SAN DIEGO GAS & ELECTRIC CO.,

Appellant,

v.

CITY OF SAN DIEGO, *et al.*,

Appellees.

BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

DANIEL J. POPEO
PAUL D. KAMENAR
1612 K Street, N.W.
Suite 605
Washington, D.C. 20006
(202) 857-0240

Attorneys for Amicus Curiae
WASHINGTON LEGAL FOUNDATION

August 22, 1980

Washington, D.C. • THIEL PRESS • (202) 638-4621

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INTERESTS OF *AMICUS CURIAE*, WASHINGTON LEGAL FOUNDATION, INC.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae.* Briefs *amicus curiae* by the Foundation have been filed with and accepted by the United States Supreme Court in the following recent cases: *Williams v. Zbaraz,* ___ U.S. ___, 48 U.S.L.W. 1957 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of State of New York,* ___ U.S. ___, 48 U.S.L.W. 4776 (1980); *United Steelworkers v. Weber,* 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers,* 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); *FCC v. WNCN Listeners Guild,* Nos. 79-824, 79-825, 79-826, 79-827 (U.S., filed Nov. 26, 1979); and *FTC v. Standard Oil Company of California,* No. 79-900 (U.S., filed Dec. 10, 1979).

WLF seeks to advance the interests, not only of appellant, but also of all companies and individuals whose property values have been destroyed by governmental takings disguised as changes in zoning regulations and who have not received just compensation. WLF therefore finds that supporting the appellant in the instant case is within the public interest.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties in this case are primarily concerned with the end results of this lawsuit. None of the litigating parties is primarily focusing upon the broader question of whether, in situations where governmental zoning changes virtually destroy the worth of affected property, their owners may sue in state courts

in inverse condemnation actions to obtain restitution. WLF's sole concern in this case is to support the right of property owners to use inverse condemnation lawsuits to protect their constitutional rights of just compensation for governmental takings, regardless of their ostensible form. The decision by the Supreme Court of California in the instant case demonstrates a permissive attitude toward excessive and arbitrary zoning regulations through its prohibition of the only viable remedy to landholders, *i.e.*, inverse condemnation actions. A decision by the United States Supreme Court reversing the California court is sought to protect fundamental property rights.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* hereby adopts by reference the statement of the facts in the appellant's Jurisdictional Statement ("Jurisdictional Statement") at 6-12.

SUMMARY OF ARGUMENT

Government zoning regulations are one aspect of the power of local communities to police or monitor their economic development. Decisions by communities to amend their zoning regulations are generally upheld by federal courts. However, arbitrary and unreasonable zoning decisions which result in a virtual destruction in the value of private property are considered to be unconstitutional takings by governments. The Fifth and Fourteenth Amendments to the United States Constitution require just compensation for the value of private lands appropriated for public use. Under the circumstances of this case, San Diego Gas & Electric has suffered an unconstitutional taking of its property by the City of San Diego. The downzoning of the utility's

industrial land to open space, as part of a San Diego plan to select sites as open spaces, has destroyed its present value; thus requiring just compensation.

An action in inverse condemnation may be maintained in state courts to obtain compensation for unlawful governmental takings. The Supreme Court of California has recently ruled that the only remedies available to parties aggrieved by unconstitutional takings are actions for mandamus and declaratory injunction. These offer inadequate relief to landowners as litigation may last years without resulting in just compensation for the damages caused by the taking. The Constitution's requirements for just compensation are met through the payment of damages in an inverse condemnation action by the property owner. Constitutional standards concerning compensation should not be lowered because property rights, not individual rights, are at issue in this case. Fundamental property rights of just compensation deserve protection by this Court.

ARGUMENT

I.

A GOVERNMENTAL ZONING REGULATION WHICH DEPRIVES A LANDOWNER OF ALL VALUE OF HIS PROPERTY BECOMES AN UNCONSTITUTIONAL TAKING.

Appellant San Diego Gas & Electric Co. alleges that the City of San Diego, in reclassifying a significant amount of its land from industrial to open space through administrative proceedings, destroyed its value and prevented its commercial use without due process and just compensation as constitutionally mandated. Jurisdictional Statement at 3-4. Pertinent constitutional provisions are the Fourteenth Amendment's due process clause

and the Fifth Amendment's just compensation clause (applicable to the states through the Fourteenth Amendment).[1] The utility claims that the city has engaged in an unconstitutional taking of property.

The United States Supreme Court has examined the issue of when governmental zoning actions constitute an unlawful taking in a number of cases. Zoning decisions may be declared unconstitutional when they are arbitrary and unreasonable. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). *See Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928). Another factor may be that a zoning regulation deprives a property owner of "economically viable" land. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 138, n.36 (1978). *See Agins v. City of Tiburon*, ___U.S. ___, 48 U.S.L.W. 4700, 4701 (1980). The police power of communities to develop zoning plans is not unlimited in scope.

Justice Holmes noted that a diminution of property values could be a consequence of a zoning regulation. When such diminishing occurs, a court must examine "the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain

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[1]The Fifth Amendment to the Constitution of the United States provides:

> [N]or shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

See Comments, 15 San Diego L. Rev. 1211, 1230 (1978).

the act. So the question depends upon the particular facts." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922). *See Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962).

Amicus urges that under the facts present in the instant case, the actions by the City of San Diego have gone beyond their legitimate police powers concerning zoning classifications and have become artibrary, unreasonable and unconstitutional.

The State of California's legislature has enacted a number of laws requiring California's cities and counties to maintain "open-spaces" within their respective jurisdictions in order to preserve some rural areas from encroaching urban expansion. These open spaces are considered to be either places of great aesthetic value or where necessary for conservation or for maintaining or increasing the value of nearby property. California Government Code §§ 6950-54. *See* Appendix to Appellant's Jurisdictional Statement ("Appendix") at K-2, K-3. The legislature has placed limits on the open-space program. Jurisdictions are warned that open space zoning laws should not be enacted or amended "in a matter which will take or damage private property for public use without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States." California Government Code § 65912. Appendix at K-4.

Federal courts have, in the past, upheld the right of property owners to go to court to obtain compensation for arbitrary and unlawful zoning ordinances. *See Jackson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir.), *aff'd sub nom. Lake Country Estates,*

Inc. v. Tahoe Regional Planning Agency, ___ U.S. ___, 99 S. Ct. 1171 (1979); *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977).

The most recent federal court decision involving governmental takings was *Agins v. City of Tiburon, supra*, decided on June 10, 1980 by the United States Supreme Court. This case concerned a challenge by a landholder and his wife of the open space zoning ordinances of a California city on the grounds of inverse condemnation and unconstitutionality. The ordinances prevented the landowners from building more than five one-family dwellings upon five acres of valuable land which featured a spectacular view of San Francisco Bay.

The Court did not rule on whether the property owners could utilize inverse condemnation as a remedy in the state courts, as it initially upheld the constitutionality of the Tiburon land use plan. 48 U.S.L.W. at 4702. The use of inverse condemnation as a remedy is at issue in this case and will be discussed in the next section of this Argument. This is one reason that *amicus* stresses that the Court should distinguish the case at bar with *Agins v. City of Tiburon*.

In *Agins*, the appellants suffered a significant diminution of the value of their land as their ability to build housing was limited. Yet, they were not deprived of all commercial use by the open space ordinance. Appellant, on the other hand, faces a virtually complete deprivation of commercial use of the approximately 206 acres of land involved in this litigation.

This land at issue was by its nature (*i.e.*, sparsely vegetated, salty and marshy) unsuitable for any use but industrial. In fact, the 1967 General Plan of San Diego had classified all of the property for industrial use. The

land was located in an area of the city where much industrial activity was taking place. It had originally been acquired by San Diego Gas & Electric as a possible site for a power plant before the issuance of the 1967 and subsequent San Diego General Plans. Jurisdictional Statement at G-7.

Under these facts, the decision by the San Diego City Council on June 19, 1973 to designate the 206 acres of undeveloped land as open space was clearly arbitrary and unreasonable. It overturned a previous decision made by the City Council on June 7, 1973, which would have retained most of appellant's land for industrial use, without explanation. Jurisdictional Statement at 9-10.

As a consequence of its zoning decision, the present use of this property is being interferred with by the city. Although the land is vacant, excluding some utility lines, its retention is necessary for use as a site for a proposed power plant. The downzoning of the area to open space destroys its current value as industrial development has become impossible. This interference is an aspect of a governmental taking. *Penn Central Transportation Co. v. City of New York,* 438 U.S. at 136. San Diego's zoning regulations act to prevent the utility from developing its property, not just for a particular purpose, but also for any reasonable commercial development. *See William C. Haas & Co. v. City and County of San Francisco,* 605 F.2d 1117, 1120 (9th Cir. 1979).

The land, due to its natural condition, cannot be realistically expected to be valuable for agricultural or residential use, especially when its owner is a utility company whose *raison d'existence* is to generate electrical power and light.

The reclassification of this land as open space was also inconsistent with the requirements of San Diego's Municipal Code and General Plan concerning designation of open space areas.[2] Appellant's land has no intrinsic value as parkland nor is it particularly historic or scenic in character. Sufficient evidence is lacking as to any value of the property for conservation purposes. In addition, maintaining the property as open land will not act to enhance the value of neighboring properties, as the area the land is situated on contains much industrial activity; activity which would be benefitted more by a new San Diego Gas power plant.

Amicus urges that these facts be considered by the Court in determining whether an unconstitutional taking by San Diego has occurred. If there are any circumstances which demonstrate a taking without compensation by the government, the instant case should be a

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[2]The definition of "open space" in San Diego's General Plan is:

> any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes.

San Diego Municipal Code section 61.0601 defines open space as:

> any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the "Progress Guide and General Plan for the City of San Diego" as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources.

prime example. A decision to overturn the Supreme Court of California will act to strengthen constitutional protections of private property.

Of special note in this case, is that the City of San Diego in 1972 unsuccessfully attempted, through a bond issue election, to raise funds to acquire a number of properties, including appellant's for use as open space. Appendix, Findings of Fact Nos. 9-13 at A-3, A-4. The failure of San Diego's precondemnation scheme provided an incentive for the city to avoid the compensation requirements of eminent domain proceedings. The city has tried to acquire the property of San Diego Gas & Electric in cynical disregard to the purposes of the California laws regarding open space acquisition and the Constitution's mandate for a just compensation.

Appellant San Diego Electric & Gas Company has claimed deprivation of its constitutional rights. The level of constitutional protection should not be lowered by the courts merely because property rights, not individual rights are at issue. Justice Stewart, in an opinion for the Supreme Court, has noted:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, ... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

The remaining issue to be examined by *amicus* involves whether a landowner whose property has been unconstitutionally taken by a local government can maintain a cause of action in inverse condemnation.

II.

A PROPERTY OWNER ADVERSELY AFFECTED BY AN UNCONSTITUTIONAL GOVERNMENTAL TAKING SHOULD BE ABLE TO MAINTAIN AN ACTION OF INVERSE CONDEMNATION IN STATE COURT TO RECOVER DAMAGES.

Inverse condemnation is a type of legal proceeding filed by a landowner in a state court against a governmental entity alleging a "taking" of his property without the just compensation required by the Fifth and Fourteenth Amendments of the United States Constitution. The landowner claims that the actions by the government, which have destroyed or diminished the value of his property without legal proceedings occurring, constitutes eminent domain for which compensation is required. This condemnation is considered inverse as the party alleging that a condemnation of land is occurring is not a government but a property owner.[3]

The Supreme Court of California has articulated a new standard for remedies in cases where uncompensated governmental takings have occurred. The court has ruled that no damages for inverse condemnation may be awarded to property owners no matter how outrageous or confiscatory a municipality's taking may be. The only remedies provided are actions for mandamus and declaratory judgment. *Agins v. City of Tiburon*, 24

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[3]Bozung, *Judicially Created Zoning with Compensation: California's Brief Experiment with Inverse Condemnation*, 10 Envt'l L. 67, 70 (1979).

Cal. 3d 266, *aff'd,* 48 U.S.L.W. at 4702; Appendix at G-4. *See* Bozung, *supra* at 98.

These remedies, alone, are insufficient to compensate a property owner for arbitrary and unlawful zoning regulations. It might take years of litigation before a landowner could obtain a favorable ruling from a court which would permit the effective use of his property. Meanwhile, he would have suffered economic injury by his inability to lawfully exploit the full commercial potential of his land. These losses, however significant, would not be reimbursed by the governmental entity which originally violated the law. Threats of mandamus actions alone are clearly insufficient to deter the promulgation of excessively burdensome and arbitrary zoning regulations. In addition, damages which are obtained in an inverse condemnation action, *must* be awarded to injured property owners in order to satisfy the constitutional command for "just compensation" of private property taken for public use.

As Justice Black emphasized:

> [T]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. 40, 49 (1960).

Requiring the City of San Diego to compensate San Diego Gas & Electric for the appropriation of its land for open space (as well as for other companies and individuals in circumstances similar to that of the instant case) will cost money. It is understandable that in these times of economic austerity, that municipalities and

other local instrumentalities of government, would wish to limit their expenditures. Yet, "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis,* 373 U.S. 526, 537 (1963).

Constitutional protection has not been obtained cheaply. At times, all citizens should be prepared to make sacrifices for the common good. A landowner may be prepared to sacrifice enjoyment of his property for some public use but this does not mean that the landowner can expect that the taking by a government of his property would be confiscatory. *Amicus* finds that property owners facing inverse condemnation are entitled to more protection from the law than just the ineffective remedies of mandamus and declaratory judgment.

Amicus agrees with the contentions of appellant that the denial of the inverse condemnation remedy when illegal takings have occurred will act to seriously erode private property rights in California. Jurisdictional Statement at 16-19. The judgment of the California courts, if upheld by this Court, will be a major influence on inverse condemnation suits nationwide. Therefore, it is imperative that the fundamental historical and legal protections of compensation for unlawful takings be maintained by this Court.

CONCLUSION

A property owner, when affected by a change in a zoning regulation which would reduce the economic value of his land to virtually nothing, may claim an unconstitutional taking by a government. If this claim

is upheld by the courts, inverse condemnation (involving just compensation) is a suitable remedy.

Under the circumstances of this case, San Diego Gas & Electric Company has been deprived of its right of just compensation for a zoning change which amounts to a taking of its land by the City of San Diego. *Amicus* submits that it is in the public interest for the rights of American citizens, individuals and businesses alike, to be fairly and adequately compensated by governmental entities. *Amicus* urges the Court to maintain the threatened constitutional protections of just compensation by reversing the Supreme Court of California in this case.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR

Attorneys for Amicus Curiae,
*WASHINGTON LEGAL FOUNDATION**

1612 K Street, N.W.
Suite 605
Washington, D.C. 20006
(202) 857-0240

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*David H. Stonehill, Staff Attorney at the Washington Legal Foundation, assisted in the preparation of this brief.